DISHONOUR OF CHEQUE JUDGEMENTS

2024(2)GDCJ487

DELHI HIGH COURT

[Before Manoj Kumar Ohri]

Crl M C (Criminal Miscellaneous Case) No 2191 of 2023 **dated 24/09/2024**

Sanjay Kumar Gaur & Anr

Versus

State GNCT of Delhi & Ors

FIR NOT REQUIRED

Code of Criminal Procedure, 1973 Sec. 156, Sec. 200, Sec. 202 - Negotiable Instruments Act, 1881 Sec. 138 - FIR Not Required - Petitioners sought quashing of an order dismissing their application under Section 156(3) CrPC for registration of an FIR regarding alleged misuse of security cheques - Cheques were part of a land deal cancellation, and dishonoured due to stop payment instructions - Courts found dispute to be civil in nature and held that petitioners had all necessary evidence to proceed under Section 200 CrPC without police investigation - Held that FIR was unnecessary - Petition Dismissed.

Law Point: In cases involving cheque disputes arising from civil agreements, courts may reject requests for police investigation under Section 156(3) CrPC if the complainant has sufficient evidence to pursue the matter privately under Section 200 CrPC.

ફોજદારી કાર્યરીતિ સંહિતા, 1973 કલમ 156 કલમ 200 કલમ 202 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ 1881 કલમ 138 – એફ.આઈ.આર. જરૂરી નથી - અરજદારોએ તારણ માં આપેલ ચેકના કથિત દુરૂપયોગ અંગે એફ.આઈ.આર. નોંધવા માટે ફોજદારી કાર્યરીતિ સંહિતા હેઠળ તેમની અરજીને ફગાવી દેવાના આદેશને રદ્દ કરવાની માંગ કરી હતી - ચેક જમીનના સોદાને રદ્દ કરવાનો એક ભાગ હતા, અને ચુકવણી બંધ કરવાની સૂચનાઓને કારણે તે વણ ચૂકવાયેલ પરત ફરેલ - અદાલતોએ વિવાદને દિવાની હોવાનું જણાયું હતું અને જણાવ્યું હતું કે અરજદારો પાસે પોલીસ તપાસ વિના કલમ 200 ફોજદારી કાર્યરીતિ સંહિતા હેઠળ આગળ વધવા માટે તમામ જરૂરી પુરાવા છે - એવું ઠરાવ્યું હતું કે એફ.આઈ.આર. બિનજરૂરી છે - અરજી નામંજૂર

કાયદા નો મુદ્દો: દિવાની કરાર માંથી ઉદ્ભવતા ચેક વિવાદો સાથે સંકળાયેલા કેસોમાં જો ફરિયાદી પાસે કલમ 200 ક્રિમિનલ પ્રોસિજર કોડ હેઠળ ખાનગી રીતે મામલાને આગળ વધારવા માટે પૂરતા પુરાવા હોય તો કોર્ટ કલમ 156(3) ક્રિમિનલ પ્રોસિજર કોડ હેઠળ પોલીસ તપાસ માટેની વિનંતીઓને નકારી શકે છે.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 156, Sec. 200, Sec. 202
Negotiable Instruments Act, 1881 Sec. 138

Counsel:

Uttam Datt, Rishi Raj Sharma, Sonakshi Singh, Kumar Bhaskar, Aman Sanjeev Sharma, Sanjeev Sabharwal, Arvind Nayjar (Senior Advocate), Mayank Mishra, Raunak Singh, Kunwar Surya Pratap

JUDGEMENT

Manoj Kumar Ohri, J.- [1] By way of present petition, the petitioners seek quashing of the order dated 04.01.2023 passed by learned ASJ, Patiala House Courts, New Delhi in Cr. Rev. No. 108/2022 titled "SANJAY KUMAR GAUR & ANR vs STATE & ORS" whereby the learned ASJ has upheld the Order of the learned Additional Chief Judicial Magistrate (ACJM) dated 22.02.2022 dismissing the petitioners' application under Section 156(3) Cr. P.C.

[2] Briefly stated, the petitioners/complainants claim to be the joint owners of the agricultural land measuring 43.10 acres situated at village Durina/Dulina, Tehsil Jhajjar, Haryana. The petitioners entered into Agreement to Sell dated 25.04.2019 (hereafter, the ATS) with M/s Dalmia Ram Rattan Strategic Investment LLP/respondent No. 7 for an advance consideration of Rs. 4.72 crores out of a total sale consideration of INR 1,10,00,000 per acre of land and the balance sum was to be paid on execution of sale deed. However, due to lack of funds, the sale could not be completed within the stipulated period. Consequently, the petitioners terminated the said agreement and forfeited the advance received. It was further claimed that thereafter, the petitioners gave two post-dated cheques to respondent No. 5 as security for executing the cancellation deed. On 22.01.2022, the cancellation agreement was executed and refund of advance was made by way of the RTGS. However, contrary to the understanding, the said two cheques were never returned to the petitioners and later, misused by respondent No. 7 by presenting them for encashment. The petitioners in order to avoid wrongful loss issued instruction to their bank for stop payment. The cheques were dishonoured whereafter, respondent No. 7 initiated proceedings under Section 138 Negotiable Instruments Act (NI Act) against the petitioners.

[3] As the respondent no.7 had acted contrary to understanding between the parties, the petitioners filed a police complaint regarding the alleged illegal act but

since no action was taken, the petitioners moved an application under Section 156(3) CrPC. In the Action Taken Report (ATR), requisitioned by the Ld. ACJM, it was reported that a civil suit was pending regarding recovery from Aravali Logistics Park Pvt Ltd as balance amount of Rs. 4.7 crore was still due. It was also reported that the cases filed by the respondent No. 7 under Section 138 NI Act were dismissed on technical ground by the concerned Court at Gurugram. Further, it was stated that the dispute arose between the parties due to violation of verbal/contractual agreement and that the matter is civil in nature. Learned ACJM while dismissed the application under Section 156(3) CrPC and directed continuation of proceedings under Section 200 CrPC, the petitioners challenged the same however, the revisional court also found no merit and dismissed the challenge.

[4] Learned counsel for the petitioners submit that the learned ASJ has erroneously and wrongly concluded that that there is no infirmity in the findings of the Ld. ACJM, that all evidence is within control/reach of the petitioners and therefore, the application under Section 156(3) CrPC has been wrongly dismissed. It is stated that the attempt made by the accused persons to encash the post-dated cheques amounts to an offence under Section 406/420/120B/511/34 IPC and the learned court failed to notice that if preliminary inquiry discloses commission of cognizable offence, then FIR must be registered. In this regard, reliance has been placed on the decision of Supreme Court in case **Lalita Kumari Vs. Government of UP**, 2014 2 SCC 1.

Further, it is stated that in the ATR filed on 28.01.2022, it has been mentioned that disputed cheques do not bear the handwriting of the petitioners and that it is beyond the reach of the petitioners to investigate and lead evidence in a private complainant as to in whose hand-writing the cheques were filled up. It is further stated that police investigation is required to bring further evidence on record given that the amount of financial embezzlement involved is Rs. 9.40 crores by the respondents. Additionally, it is submitted that the affidavits filed by respondent no.5 and M/s Aaravali in the civil suit before the concerned court in Gurugram are forged and fabricated and therefore the role of all the respondents are required to be investigated.

[5] Learned APP for the state submits that as per the status report placed on record, the dispute arose between the parties due to violation of verbal/contractual agreement made between the parties during the said land deal which is civil in nature and that no cognizable offence has been found committed in the present matter.

[6] Learned counsel for respondent Nos. 2 to 4, 6 and 7 submits that the impugned order does not suffer from any infirmity, the Ld. ASJ has correctly upheld that finding of the Ld. ACJM that no field of inquiry is required for collection of evidence and therefore the present case does not warrant the registration of an FIR. If any evidence is required, it could be adduced at the stage of inquiry under Section 202 of the Cr.P.C. It is further, submitted that the primary dispute is regarding an oral understanding and consequent bouncing of two cheques issued by the petitioners to respondent No. 7.

Regarding the aforesaid, it has been observed by Ld. ACJM as well as ASJ in the impugned order that dispute regarding the bouncing of cheque is being adjudicated and that in fact the petitioners are in possession of all the information required to file a private complaint, making an investigation under Section 156(3), Cr.P.C unnecessary. Learned counsel for respondent No. 5 adopts the submissions made on behalf of other respondents.

[7] I have heard the counsels for parties and perused the material available on record. Needless to state that the power conferred upon the Ld. Magistrate under Section 156(3) of the Cr.P.C. ought to be exercised judiciously and in a sparing manner, rather than in a mechanical fashion. However, at the same time, where disputes appear to be civil in nature or the party approaching the court has all the evidence in its possession, the court will be within its power to apply judicial mind which would depend on the facts and circumstances of each case.

[8] The issue also arose before a co-ordinate Bench of this court in **Skipper Beverages Pvt. Ltd. v. State**, 2001 59 DRJ 129and in para 6 and 7 it has been observed as under:

Para-6: Chapter XII of the Code deals with information to the police and its power to investigate the offences. Section 156 of the Code included in this chapter speaks of the power of the police officers to investigate cognizable cases and sub clause (3) thereof lays down that any Magistrate empowered under Section 190 of Code may order such an investigation. Chapter XV of the Code deals with complaints to a Magistrate and the procedure to be adopted by the Magistrate after taking cognizance of an offence. This chapter provides an alternative as well as additional remedy to a complainant whose complaint is either not entertained by the police or who does not feel satisfied by the investigations being conducted by the Police.

Para-7: It is true that Section 156(3) of the Code empowers a Magistrate to direct the police to register a case and initiate investigations but this power has to be exercised judiciously on proper grounds and not in a mechanical manner. In those cases where the allegations are not very serious and the complainant himself is in possession of evidence to prove his allegations there should be no need to pass orders under Section 156(3) of the Code. The discretion ought to be exercised after proper application of mind and only in those cases where the Magistrate is of the view that the nature of the allegations is such that the complainant himself may not be in a position to collect and produce evidence before the Court and interests of justice demand that the police should step in to held the complainant. The police assistance can be taken by a Magistrate even Under Section 202(1) of the Code after taking cognizance and proceeding with the complaint under Chapter XV of the Code as held by Apex Court in 2001 (1) Supreme Page 129 titled "Suresh Chand Jain v. State of Madhya Pradesh"

[9] It is deemed apposite to also refer to the decision of this Court in **Shri Subhkaran Luharuka & Anr. v. State**, 2010 6 ILR(Del) 495wherein it has been observed:-

> "42 Thus, there are pre-requisites to be followed by the complainant before approaching the Magistrate under Section 156(3) of the Code which is a discretionary remedy as the provision proceeds with the word 'May'. The magistrate is required to exercise his mind while doing so. He should pass orders only if he is satisfied that the information reveals commission of cognizable offences and also about necessity of police investigation for digging out of evidence neither in possession of the complainant nor can be procured without the assistance of the police. It is thus not necessary that in every case where a complaint has been filed under Section 200 of the Code the Magistrate should direct the Police to investigate the crime merely because an application has also been filed under Section 156(3) of the Code even though the evidence to be led by the complainant is in his possession or can be produced by summoning witnesses, may be with the assistance of the court or otherwise .

[10] It is to be noted that the learned ASJ while concurring with the view taken by ld. ACJM has rightly noted that the petitioners have clearly specified that in the present complaint, the details of incident, all the venue where the meetings took place has also been specified, the amount was returned through RTGS and all the details of the transactions are available with the complainant. The details/credentials of the accused persons have been specified in the memo of parties, which shows that all the accused persons are known to the complainant and therefore the court arrived at the conclusion that the evidence is well within the reach and power of the complaint and no registration of FIR is required in the present case. It is not res integra that proceedings under Section 138 NI Act are maintainable even if the writing on the cheque is different as long as the signatures are admitted. The complainant can adduce private evidence in this regard in the complaint proceedings pending under Section 200 CrPC.

[11] Keeping in mind the settled principle of law in the above-noted cases, I concur with the findings of Courts below and find no infirmity in the impugned order. Accordingly, the petition stands dismissed

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2024(2)GDCJ492

DELHI HIGH COURT

[Before Amit Mahajan]

Crl M C (Criminal Miscellaneous Case); Crl M A (Criminal Miscellaneous Application) No 4294 of 2024; 16288 of 2024, 16289 of 2024, 16290 of 2024

dated 20/09/2024

Anil Kulshrestha

Versus

Fiitjee Ltd

SECURITY CHEQUES

Code of Criminal Procedure, 1973 Sec. 482 - Contract Act, 1872 Sec. 23 - Negotiable Instruments Act, 1881 Sec. 138 - Security Cheques - Petitioner sought quashing of summons issued in a complaint under Section 138 of the Negotiable Instruments Act - Respondent presented two security cheques issued by petitioner during his employment, which were dishonoured - Petitioner contended that cheques were undated and issued for security, not towards any enforceable debt, and that the service manual mandating such cheques was unconscionable under Section 23 of Contract Act - Court observed that whether cheques were issued for security or liability is a question of fact that cannot be decided in quashing proceedings - Summoning order upheld - Petition dismissed

Law Point: Security cheques issued in employment contracts may attract Section 138 of the Negotiable Instruments Act if dishonoured. Whether they were issued towards enforceable debt or as security is a factual issue for trial.

ફોજદારી કાર્યરીતિ સંહિતા, 1973 કલમ 482 - કરાર અધિનિયમ, 1872 કલમ 23 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 કલમ 138 – તારણ માં આપેલા ચેક - અરજદારે નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટની કલમ 138 હેઠળની ફરિયાદ ના અનુસંધાને કરાયેલા સમન્સને રદ્દ કરવાની માંગ કરી હતી - પ્રતિવાદીએ તેની નોકરી દરમિયાન અરજદાર દ્વારા જારી કરાયેલા બે તારણ માં આપેલ ચેક રજૂ કર્યા હતા, જે વણચૂકવાયેલ પરત થયેલ - અરજદારે એવી તકરાર લીધી હતી કે ચેકમાં કોઈ તારીખ ન હતી અને જામીનગીરી માટે જારી કરવામાં આવ્યા હતા કોઈ પણ રીતે અમલ કરવી શકાય તેવા દેવા માટે નહીં અને આવા ચેકને ફરજિયાત કરતી સર્વિસ મેન્યુઅલ કોન્ટ્રાક્ટ એક્ટની કલમ 23 હેઠળ અનિયંત્રિત છે - કોર્ટે અવલોકન કર્યું હતું કે શું ચેક તારણ પેટે અથવા

જવાબદારી માટે જારી કરવામાં આવ્યા હતા તે હકીકતનો પ્રશ્ન છે જે રદ્દ કરવા ની કાર્યવાહી માં તેનો નિર્ણય લઈ શકાતો નથી - સમન્સ કરવા નો હુકમ માન્ય રાખ્યો - અરજી નામંજૂર.

કાયદાનો મુદ્દો: રોજગાર કરારમાં આપવા માં આવેલ ચેક વણ ચૂકવાયેલ પરત ફરે તો જારી કરાયેલી સુરક્ષા તપાસો નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટની કલમ 138 આકર્ષી શકે છે. શું તેઓ લાગુ કરવા યોગ્ય દેવા માટે જારી કરવામાં આવ્યા હતા અથવા સુરક્ષા તરીકે અજમાયશ માટે એક વાસ્તવિક કેસ ચલાવતી વખતે નો મુદ્દો છે.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 482
Contract Act, 1872 Sec. 23
Negotiable Instruments Act, 1881 Sec. 138

Counsel:

Archana Pathak Dave(Senior Advocate), Kumar Prashant, Avnish Dave, Parmod Kumar Vishnoi

JUDGEMENT

Amit Mahajan, J.- [1] The present petition is filed challenging the order dated 28.08.2023 (hereafter 'the impugned order') passed by the learned Metropolitan Magistrate (MM) (NI Act) Digital Court-03, Saket Courts, New Delhi in a complaint filed by the respondent being CC NI Act No. 2369/2023, under Section 138 Of Negotiable Instruments Act, 1881 ('NI Act').

[2] The learned MM, by the impugned order, has taken cognizance of the complaint filed by the respondent and issued summons against the accused/petitioner.

[3] The case of the complainant is that the complainant is a wellknown institute that undertakes coaching in the name of FIITJEE Ltd. for students for various competitive exams. The accused/petitioner was appointed as Assistant Professor in the Mathematics Department on 02.06.2022. The terms and conditions of employment of the accused were contained in the 'Service Contract Manual for the Employees' which were duly accepted by the accused and he furnished two cheques bearing no. 121010 and 121011 both drawn on Axis Bank, Morena, MP for a sum of ?2,92,800/- and ?8,47,200/- respectively in lieu of the said acceptance. It is alleged that in terms of the Service Manual, the complainant had implied authority to fill in the date in the said cheques, in case of any violation of terms of the service manual.

[4] The accused failed to report with effect from October, 2022, absented himself from duty, and abandoned the job. The accused thus caused breach of terms and

conditions and became liable to pay preestimated and pre-determined damages in terms and conditions governing him.

[5] The complainant, thereafter, served the accused with a letter dated 07.01.2023 asking him to keep his account funded to honour the cheques in question.

[6] According to the complainant, the aforesaid cheques when presented for realisation, were received back dishonoured vide bank return memo dated 17.01.2023 with the remarks 'Payment Stopper by the Drawer'. Consequentially, a legal notice dated 13.02.2023 was served by the complainant upon the accused calling upon the accused to make the payment towards the cheque amount in question within 15 days of receipt of the notice. According to the complainant, the said notice was duly served upon the accused but no payment against the above dishonoured cheques was made by the accused within the statutory period. Hence the present complaint.

[7] The cognizance of offence under Section 138 of the NI Act was taken by the learned MM and the accused was summoned vide the impugned order dated 28.08.2023. The learned MM noted as under:

> "After having perused the complainant evidence by way of affidavit and the documents exhibited in it and treating them as evidence, there remains no need for examination of other witness in person or on affidavit; examination of complainant affidavit and exhibited documents is sufficient enquiry in this case. The ingredients of section 138 NI act stands prima-facie satisfied. Therefore, there appears sufficient grounds for proceeding against the accused for offence punishable under section 138 of NI act. Hence, issue summons against the accused through SHO concerned on filing of PF returnable on or before NDOH. The process server is directed to serve the summons by way of affixation, in case premises found closed or the same could not be served personally or on any adult male member after ascertaining the address from two respectable inhabitants of the locality."

[8] It is the case of the petitioner that the respondent has sought to abuse the process of law as they base their case on the service manual, the terms of which are opposed to public policy, and violative of the settled principles of law, equity, and natural rights.

[9] The learned senior counsel for the petitioner submitted that the service contract so entered into is invalid, as his consent was obtained through undue influence. The HR representative at the respondent institute made the petitioner sign the service contract while hurriedly flipping through the pages, disallowing the petitioner the opportunity to peruse the contents thereof and he was not given a copy of the agreement.

[10] She submitted that the respondent exercised its position of power and authority to acquire two blank signed cheques from the petitioner. The amount and

date on these cheques were filled by the respondent institute pursuant to the resignation tendered by the petitioner. She alleged that the respondent has falsely claimed to issue the legal notice under Section 138 of the NI Act. She has relied on judgment dated 04.03.2015 in the case of Vivek Rai Vs Aakash Institute,2015 DHC 2095 wherein this Court found a similar clause requiring submission of undated blank cheques by an employee of the coaching institute to be unconscionable and opposed to public policy, therefore, hit by Section 23 of the Contract Act, 1872 (hereafter 'the Contract Act').

[11] She submitted that the summoning order is erroneous, perverse, bereft of reasons, and has been passed in a mechanical manner, and there is no legally enforceable debt or liability for which the respondent can demand any amount. She further submitted that the same is an abuse of the process of law, the prime argument being that the cheque in question did not represent an amount that could be termed as 'legally enforceable debt or other liability'. She placed reliance on Indus **Airways Private Limited and Others vs. Magnum Aviation Private Limited and Another**, 2014 12 SCC 539.

[12] It was submitted that the offence under Section 138 of the NI Act is not made out since the amount mentioned on the cheques was not in lieu of any debt owed to the respondent-institute. On the date of issuing the cheques, no liability existed against the petitioner. In the absence of any legally enforceable debt or liability against the drawer of the cheque, the offence under Section 138 of the NI Act will not be attracted.

[13] Aggrieved by the aforesaid order, the petitioner has preferred the present petition seeking the quashing of the impugned order, and the criminal proceedings arising out of the complaint.

ANALYSIS

[14] In the instant case, the respondent had filed a complaint under Section 138 of the NI Act on 17.03.2023. The learned MM relying upon the complaint supported by the affidavit of the complainant, took cognizance under Section 138 of the NI Act, and passed the summoning order dated 28.08.2023.

[15] It is stated that when the cheques in question were given to the complainant, dates were not mentioned therein and they were given for security purposes. The core argument, upon which, the learned counsel for the petitioner argued is that since there was no legally enforceable debt or other liability at the time of drawal/issuance of the cheques, the provisions of Section 138 of the NI Act would not attract. The second limb of her argument is that the clauses contained in the Service Rule Manual are unconscionable and contrary to public policy under Section 23 of the Contract Act.

[16] The issue to be addressed in the instant case is whether summons issued can be quashed based on factual defences, i.e., whether the security cheques given by the petitioner were towards any future consideration or legally enforceable debt.

[17] It is contended by the learned counsel for the petitioner that the complainant in the present case has not been able to establish a legally enforceable debt owed by the petitioner. The cheques were admittedly issued as a security and were not given towards any future consideration payable by the petitioner. The petitioner was not liable to pay any amount and, therefore, the cheques could not have been presented for encashment. The petitioner at no stage was required to make any payment that could be construed as a legally enforceable debt enabling the complainant to present the cheques in question.

[18] At the outset, it is relevant to note that this Court can quash the summoning orders issued in NI Act cases in the exercise of its inherent jurisdiction under Section 482 of the Code of Criminal Procedure, 1973 (CrPC) if such unimpeachable material is brought forth by the accused persons which indicates that they were not concerned with the issuance of the cheques or that no offence is made out from the admitted facts. The Hon'ble Apex Court in the case of Rathish Babu Unnikrishnan v. State (NCT of Delhi),2022 SCCOnLineSC 513 had discussed the scope of interference by the High Court against the issuance of process under the NI Act as under:

> "8. The issue to be answered here is whether summons and trial notice should have been quashed on the basis of factual defences. The corollary therefrom is what should be the responsibility of the quashing Court and whether it must weigh the evidence presented by the parties, at a pre-trial stage. xxxx xxxx xxxx
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> 16. The proposition of law as set out above makes it abundantly clear that the Court should be slow to grant the relief of quashing a complaint at a pre-trial stage, when the factual controversy is in the realm of possibility particularly because of the legal presumption, as in this matter. What is also of note is that the factual defence without having to adduce any evidence need to be of an unimpeachable quality, so as to altogether disprove the allegations made in the complaint.
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> 17. The consequences of scuttling the criminal process at a pretrial stage can be grave and irreparable. Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e., the trial Court is ousted from weighing the material evidence. If this is allowed, the accused may be given an un-merited advantage in the criminal process. Also because of the legal presumption, when the cheque and the signature are not disputed by the appellant, the balance of convenience at this stage is in favour of the complainant/prosecution, as the accused will have due opportunity to adduce defence evidence during the trial, to rebut the presumption.
>
> 18. Situated thus, to non-suit the complainant, at the stage of the summoning order, when the factual controversy is yet to be canvassed and considered by

the trial court will not in our opinion be judicious. Based upon a prima facie impression, an element of criminality cannot entirely be ruled out here subject to the determination by the trial Court. Therefore, when the proceedings are at a nascent stage, scuttling of the criminal process is not merited."

[19] In the case of **Sunil Todi and Others v. State of Gujarat and Another**, 2022 16 SCC 762, the cheques were issued by the accused as a security deposit under a power supply agreement, and on non-payment of the amount, the cheques were dishonoured on its presentation. It was contended on behalf of the accused that the cheques were intended at all material times to be security towards debt and were not intended to be deposited and would not attract the provisions of Section 138 of the NI Act on its dishonour. The Hon'ble Apex Court, after considering the earlier judgments on the issue, held as under:

"23. Besides the distinguishing features which were noticed in Sampelly,, there was another ground which weighed in the judgment of this Court. The Court adverted to the decision in HMT Watches v. MA Habidato hold that whether the cheques were given as security constitutes the defense of the accused and is a matter of trial. The extract from the decision in HMT Watches, which is cited in the decision in Indus Airways is thus:

"10. Whether the cheques were given as security or not, or whether there was outstanding liability or not is a question of fact which could have been determined only by the trial court after recording evidence of the parties. In our opinion, the High Court should not have expressed its view on the disputed questions of fact in a petition under Section 482 of the Code of Criminal Procedure, to come to a conclusion that the offence is not made out. The High Court has erred in law in going into the factual aspects of the matter which were not admitted between the parties. xxxx xxxx xxxx

33. At this stage, it would be instructive to note the order of a two judge Bench of this Court in Womb Laboratories Pvt. Ltd. v. Vijay Ahuja. In that case, the High Court had quashed proceedings initiated against the first respondent for offences punishable under Section 138 of the NI Act merely on the basis of the assertion in the complaint that "security cheques were demanded" in response to which the accused had issued three signed blank cheques with the assurance that if the amount was not returned, the cheques could be encashed. The High Court held that the cheques were given only by way of security and therefore not towards the discharge of a debt or liability on the basis of which the complaint was quashed. Allowing the appeal by the drawee, this Court observed:

"5. In our opinion, the High Court has muddled the entire issue. The averment in the complaint does indicate that the signed cheques were handed over by the accused to the complainant. The cheques were given by way of security,

is a matter of defence. Further, it was not for the discharge of any debt or any liability is also a matter of defence. The relevant facts to countenance the defence will have to be proved - that such security could not be treated as debt or other liability of the accused. That would be a triable issue. We say so because, handing over of the cheques by way of security per se would not extricate the accused from the discharge of liability arising from such cheques."

34. The order of this Court in Womb Laboratories holds that the issue as to whether the cheques were given by way of security is a matter of defence. This line of reasoning in Womb Laboratories is on the same plane as the observations in HMT Watches,, where it was held that whether a set of cheques has been given towards security or otherwise or whether there was an outstanding liability is a question of fact which has to be determined at the trial on the basis of evidence. The rationale for this is that a disputed question of this nature cannot be resolved in proceedings under Section 482 CrPC, absent evidence to be recorded at the trial.

35. The submission which has been urged on behalf of the appellants, however, is that the fact that the cheques in the present case have been issued as a security is not in dispute since it stands admitted from the pleading of the second respondent in the suit instituted before the High Court of Madras. The legal requirement which Section 138 embodies is that a cheque must be drawn by a person for the payment of money to another "for the discharge, in whole or in part, of any debt or other liability'. A cheque may be issued to facilitate a commercial transaction between the parties. Where, acting upon the underlying purpose, a commercial arrangement between the parties has fructified, as in the present case by the supply of electricity under a PSA, the presentation of the cheque upon the failure of the buyer to pay is a consequence which would be within the contemplation of the drawer. The cheque, in other words, would in such an instance mature for presentation and, in substance and in effect, is towards a legally enforceable debt or liability. This precisely is the situation in the present case which would negate the submissions of the appellants. xxxx xxxx xxxx

54. In the present case, it is evident that the principal grounds of challenge which have been set up on behalf of the appellants are all matters of defence at the trial. The Magistrate having exercised his discretion, it was not open to the High Court to substitute its discretion. The High Court has in a carefully considered judgment, analysed the submissions of the appellants and for justifiable reasons has come to the conclusion that they are lacking in substance."

[20] This Court, in the case Suresh Chandra Goyal v. Amit Singhal,2015 SCCOnLineDel 9459 had an occasion to deal in detail with the circumstances where the debt in question can be interpreted to be owed by the accused to the complainant for the purpose of Section 138 of the NI Act. The Court interpreted the term legally enforceable debt when the cheques are issued as a security. It was held that the expression security cheque is not a statutorily defined expression in the Act. There can be a situation where the cheques are given to provide an assurance or comfort to the drawee that in case of failure to pay the primary consideration on the due date, the security may be enforced. It was held as under:

> "50. In Indus Airways Pvt. Ltd. v. Magnum Aviation Pvt. Ltd., IV,2014 SLT 321, the question that arose for consideration before the Supreme Court was, whether the post dated cheques issued by the appellants (purchasers) as an advance payment in respect of purchase orders could be considered in discharge of a legally enforceable debt or other liability and, if so, whether the dishonour of such cheques amount to an offence under Section 138 of NI Act. The appellants before the Supreme Court were the purchasers who had placed purchase orders and issued post dated cheques in favour of the respondent towards advance payment. One of the terms and conditions of the contract was that the entire payment would be made to the supplier in advance. The supplier claimed that the advance payment had to be made, as it had to procure the parts from abroad. The cheques were dishonoured upon presentation on the ground that the purchasers had stopped payment. Thereafter, the purchasers cancelled the purchase orders and requested for return of the cheques. The respondent/seller insisted on collecting payment and initiated a complaint under Section 138 of NI Act after sending a demand notice.
>
> 51. This Court, following its decision in Moji Engineering Systems Ltd. v. A.B. Sugars Ltd.,2008 DLT 579, held that the issuance of a cheque at the time of signing such a contract has to be considered against a liability, as the amount written in the cheque is payable by the person on the date mentioned in the cheque. xxxx xxxx xxxx
>
> 61. Thus, in my view, it makes no difference whether, or not, there is an express understanding between the parties that the security may be enforced in the event of failure of the debtor to pay the debt or discharge other liability on the due date. Even if there is no such express agreement, the mere fact that the debtor has given a security in the form of a post dated cheque or a current cheque with the agreement that it is a security for fulfillment of an obligation to be discharged on a future date itself, is sufficient to read into the arrangement, an agreement that in case of failure of the debtor to make payment on the due date, the security cheque may be presented for payment,

> i.e. for recovery of the due debt. If that were not so, there would be no purpose of obtaining a security cheque from the debtor. A security cheque is issued by the debtor so that the same may be presented for payment. Otherwise, it would not be a security cheque. As observed above, the MOU (Ex.CW-1/4) does not expressly, or even impliedly states that the security cheques are not to be used to recover the installments, even in case of failure to pay the same by the respondent/debtor.
>
> 62. Section 138 of NI Act does not distinguish between a cheque issued by the debtor in discharge of an existing debt or other liability, or a cheque issued as a security cheque on the premise that on the due future date the debt which shall have crystallized by then, shall be paid. So long as there is a debt existing, in respect whereof the cheque in question is issued, in my view, the same would attract Section 138 of NI Act in case of its dishonour."

[21] Section 138 of the NI Act specifically mentions that the cheque must have been issued for discharge of not only any debt but can also be for "other liability". It is, therefore, not necessary that when the cheques are issued, the drawer had any debt to discharge on the date of issuance.

[22] As discussed above, the allegations made in the complaint, at the stage when the complaint is sought to be quashed at the initial stage, are to be taken as correct unless evidence of unimpeachable character has been produced.

[23] The legal presumption of the cheques having been issued in the discharge of liability must also receive due weightage. In a situation where the accused moves the Court for quashing even before the trial has commenced, the Court's approach should be careful not to prematurely extinguish the case by disregarding the legal presumption supporting the complaint. The Hon'ble Apex Court, in the case of **Bir Singh v. Mukesh Kumar**, 2019 4 SCC 197, held as under:

> "32. The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of a debt or liability is on the accused and fact that the cheque might be post-dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.
>
> 33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the

cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted."

[24] On a careful reading of the complaint and the order passed by the learned MM, what is apparent is that a possible view is taken that the cheques in dispute were issued with the consent and knowledge of the petitioner which were to be honoured in the event, the petitioner violated the terms of the service manual towards his liability in part or full. It is alleged by the complainant that the petitioner, unauthorizedly left, in the middle of the academic session without any intimation, information, permission or sanction of leave leading to gross violation of terms and conditions incorporated in the service manual. It is the case of the complainant that the petitioner is hence, liable for payment of damages to the complainant.

[25] When there is a legal presumption and where facts are contested, it would not be judicious for the Court to separate the wheat from the chaff under the garb of inherent powers. It has been held time and again that the power of quashing criminal proceedings while exercising power under Section 482 of the CrPC should be exercised sparingly and with circumspection.

[26] The learned counsel for the petitioner relied on the judgment passed by a coordinate bench of this Court in Vivek Rai v. Aakash Institute (supra), to contend that clauses contained in a similar Service Rule Manual pertaining to security cheques were deemed unconscionable and contrary to public policy under Section 23 of the Indian Contract Act.

[27] At this stage, however, it is important to note that the petitioner had entered into a contract with the respondent regarding his employment, which was governed by certain terms and conditions. In accordance with the contract, the petitioner provided undated cheques as security, which were duly signed. When the petitioner allegedly breached the terms of the contract, the respondent presented the cheques, and upon their dishonour, initiated proceedings under Section 138 of the NI Act.

[28] Whether the judgment relied upon by the petitioner in Vivek Rai v. Aakash Institute (supra) is applicable to the facts of the present case or whether the Service Manual signed by the petitioner was executed under coercion or deception thereby vitiating the consent are issues that necessitate a comprehensive examination during the trial. This determination would necessitate the court to adjudicate on the specific circumstances under which the contract was executed and to interpret the relevant clauses of the agreement. These are factual issues that serve as defences in the case and are not appropriate for determination under the powers conferred by Section 482 of the CrPC at this stage. It is well-established that the High Courts should refrain from expressing any views on disputed questions of fact in proceedings under Section 482 of the CrPC, as doing so would be preempting the trial.

[29] In the wake of the aforesaid discussion, this Court finds that the petitioner, at best, has raised question of fact mixed with question of law which cannot be examined

in the limited jurisdiction under Section 482 of the CrPC, for it is desirable that the same be left to be adjudicated upon based on the evidence led by both sides at the trial.

[30] In view of the above, the petition is dismissed. Pending application(s) also stand disposed of

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2024(2)GDCJ502

IN THE HIGH COURT AT CALCUTTA

[Before Ajay Kumar Gupta]

Cr R (Criminal Revision) No. 3849 of 2022 **dated 13/09/2024**

A T Deb @ Ashutosh Deb

Versus

West Bengal Essential Commodities Supplies Corporation Ltd

SECTION 202 ENQUIRY

Code of Criminal Procedure, 1973 Sec. 482, Sec. 204, Sec. 200, Sec. 202 - Negotiable Instruments Act, 1881 Sec. 138, Sec. 142 - Section 202 Enquiry - Petitioner challenged lower court's orders rejecting request for an enquiry under Section 202 of CrPC in a complaint filed under Section 138 of the Negotiable Instruments Act - Complaint alleged petitioner issued cheques to discharge existing liabilities, which were dishonoured due to insufficient funds - Petitioner sought enquiry under Section 202 as he resided beyond court's jurisdiction - Lower courts dismissed the request citing that the complaint, supported by an affidavit, met the requirement for issuing process under Section 138 without further enquiry - Held that enquiry under Section 202 is mandatory for accused residing outside jurisdiction but not applicable where sufficient satisfaction is drawn from the available records - Petition Dismissed.

Law Point: Section 202 CrPC mandates an enquiry if the accused resides beyond court's jurisdiction. However, this requirement can be waived if the court finds adequate grounds to proceed based on the complaint and supporting affidavit.

ફોજદારી કાર્યરીતિ સંહિતા, 1973 કલમ 482, કલમ 204, કલમ 200, કલમ 200, કલમ 202 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 કલમ 138, કલમ 142 - કલમ 202 ઇન્કવાયરી - અરજદારે નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટની કલમ 138 હેઠળ નોંધાયેલી ફરિયાદમાં ફોજદારી કાર્યરીતિ સંહિતાની કલમ 202 હેઠળ તપાસ માટેની વિનંતીને નકારી કાઢતા નીચલી અદાલતના આદેશોને પડકાર્યા હતા - ફરિયાદમાં આરોપ મૂકવામાં આવ્યો છે કે અરજદારે હાલની જવાબદારીઓ અદા કરવા માટે ચેક આપ્યા હતા, જે અપૂરતા ભંડોળને કારણે વણ ચૂકવાયેલ રીતે પરત થયા હતા - અરજદારે

કલમ 202 હેઠળ તપાસની માંગ કરી હતી કારણ કે તે કોર્ટના અધિકારક્ષેત્રની બહાર રહેતો હતો - નીચલી અદાલતોએ વિનંતીને નકારી કાઢી હતી કારણ કે એફિડેવિટ દ્વારા સમર્થિત ફરિયાદ વધુ તપાસ કર્યા વિના કલમ 138 હેઠળ પ્રક્રિયા જારી કરવાની જરૂરિયાતને પૂર્ણ કરે છે - ઠેરવ્યું કે કલમ 202 હેઠળ તપાસ અધિકારક્ષેત્રની બહાર રહેતા આરોપીઓ માટે ફરજિયાત છે, પરંતુ જ્યાં ઉપલબ્ધ રેકોર્ડ્સમાંથી પૂરતો સંતોષ મેળવવામાં આવ્યો હોય ત્યાં લાગુ પડતો નથી – અરજી નામંજૂર

કાયદાનો મુદ્દો: જો આરોપી કોર્ટના અધિકારક્ષેત્રની બહાર રહેતો હોય તો કલમ 202 ક્રિમિનલ પ્રોસિજર કોડ તપાસ ફરજિયાત કરે છે. જો કે જો કોર્ટને ફરિયાદ અને સમર્થન એફિડેવિટના આધારે આગળ વધવા માટે પર્યાપ્ત આધાર મળે તો આ જરૂરિયાતને માફ કરી શકાય છે.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 482, Sec. 204, Sec. 200, Sec. 202
Negotiable Instruments Act, 1881 Sec. 138, Sec. 142

Counsel:

Ayan Bhattacharjee, Arpit Choudhury, Suman Majumdar, Rajib Roy

JUDGEMENT

Ajay Kumar Gupta, J.- [1] By filing this Criminal Revisional application under Section 482 of the Code of Criminal Procedure, 1973, the petitioner being the accused has assailed the Judgment and Order dated 6th September, 2022 passed by the Court of the Learned Chief Judge, City Sessions Court at Calcutta in Criminal Revision No. 123 of 2022, thereby affirmed the Order dated 20th May, 2022 passed by the Court of the Learned Metropolitan Magistrate, 16th Court at Calcutta in connection with a Complaint Case No. C/9561 of 2005 filed under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881.

[2] By the said order dated 20th May, 2022, the Learned Metropolitan Magistrate had rejected the prayer of the petitioner for conducting an enquiry under Section 202 of the CrPC and fixed a date for cross-examination of P.W. 1.

[3] The sum and substance of the case is that the OP No. 2 being the Director of the Company, namely, West Bengal Essential Commodities Supplies Corporation Limited has filed a petition of complaint under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881 (in short 'NI Act') to the Court of Learned Metropolitan Magistrate, 16th Court at Calcutta against the petitioner herein.

3a. The complainant has alleged, inter alia, that the petitioner no. 1 being the Director of M/s. Gems Refineries (1997) Private Limited having its office at 14, P.N. Banerjee Road, P.O. and P.S. Budge Budge, District South 24 Parganas, Pin Code No. 743319 has issued 22 cheques of different amounts on the different dates aggregating to a sum of Rs. 5,17,00,000/- only in favour of the complainant to discharge its existing liabilities which was accrued out of business transaction between the accused and the complainant.

3b. Those cheques were presented on 9th and 12th September, 2005 with the Central Bank of India, New Market Branch having its office at New Market, P.S. New Market at Calcutta 700 001 but the said cheques were dishonoured by the bankers of the accused/petitioner on the ground of "insufficient funds". Such intimation has been received from the said bank on the same dates i.e. on 9th and 12th September, 2005, but in spite of issuing notice upon the accused person in or about 5th October, 2005, failed to pay the same. The notice was received and acknowledged by the accused person on 8th October, 2005.

3c. The accused committed an offence under Section 138 read with Section 142 of the NI Act, 1881 since issuance of cheques is prima facie a conclusive proof of the accused existing liability. The said cheques were issued by the accused person with ulterior motive and mala fide intention, as at the time of issuance of the said cheques, the accused person was fully aware of the fact that the same could be dishonoured as those cheques were issued intentionally and deliberately with full knowledge of having insufficient funds with its bankers. As such, the complainant has been compelled to file a complaint under Section 138 read with Section 142 of the NI Act, 1881 and as amendment therein and prayed for taking cognizance against the accused person.

3d. The Learned Magistrate issued summons after taking cognizance against the accused person under Section 138 read with Section 142 of the NI Act, 1881. Petitioner appeared and filed a petition under Section 202 of the CrPC contending therein that the accused person is residing beyond the territorial jurisdiction of the Learned Magistrate as such, the Learned Magistrate ought to have resorted to further enquiry under Section 202 of the CrPC prior to issuance of the process of summons against the accused person. The Learned Magistrate rejected the application filed by the accused vide Order dated 20th May, 2022 after hearing the parties.

3e. Being aggrieved by and dissatisfied with the Impugned Order dated 20th May, 2022, the petitioner herein filed a Criminal Revisional application before the Learned Chief Judge, City Sessions Court at Calcutta being Criminal Revision No. 123 of 2022 challenging the legality, propriety and correctness of the Impugned Order. The Learned Chief Judge, after hearing the parties, affirmed the Order dated 20th May, 2022 passed by the Learned Metropolitan Magistrate, 16th Court, Calcutta as, inter alia, as follows: -

"11. Section 145 of the NI Act provides that evidence of the complainant may be given by him on affidavit, which shall be read in evidence in an inquiry, trial or other proceeding notwithstanding anything contained in the CrPC. The Constitution Bench held that Section 145 has been inserted in the Act, with effect from 2003 with the laudable object of speeding up trials in complaints filed under Section 138. Hence, the Court noted that if the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. Consequently, it was held that Section 202(2) CrPC is inapplicable to complaints under Section 138 in respect of the examination of witnesses on oath. The Court held that the evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses and in suitable cases the Magistrate can examine documents to be satisfied that there are sufficient grounds for proceeding under Section 202.

The same view has been reflected in Sunil Todi & another's case passed on 03.12.2021 by Hon'ble Apex Court.

12. In the present case, the Ld. Magistrate had held the evidence of the complainant on affidavit and this means that the Magistrate had already held an inquiry by herself and so the Magistrate has power to postpone section 202 Cr.P.C by holding inquiry by holding separate agencies.

13. If that be so, this Court finds that the impugned order passed by the Ld. Magistrate requires no interference and thus, the impugned order is affirmed."

Under the above circumstances, the present Criminal Revisional application has been filed before this Hon'ble High Court and came up before this Bench for its disposal.

[4] Learned counsel, representing the petitioner, submitted that the petitioner/accused resides beyond the territorial jurisdiction of the Court of the Learned Magistrate. Prior to issuing process against the accused under Section 138 read with Section 142 of the NI Act, 1881, the Learned Magistrate ought to have resorted to further enquiry under Section 202 of the Code of Criminal Procedure because Section 202 of the CrPC provides mandatory enquiry in respect of accused person, who is residing beyond the jurisdiction of the Learned Court and the same was amended in the Code of Criminal Procedure, which came into effect from June 23, 2006 i.e. much after issuance of process against the accused but after pronouncement of the Special Bench Judgment of the Hon'ble Supreme Court now it has become mandatory in nature to conduct enquiry under Section 202 of the CrPC even in a case under Section 138 of the NI Act. The Five-Judge Bench of the Hon'ble Supreme Court of India in Suo Motu Writ Petition (Cri) No. 2 of 2020 in re: expeditious trial of cases under Section 138 of NI Act, 1881 reported in AIR 2021 Supreme Court 1957 at para

24 has made it clear that such enquiry under Section 202 of the CrPC is mandatory in nature. The Hon'ble Supreme Court had held as follows:

> "Enquiry shall be conducted on receipt of the complaint under Section 138 of the Act to arrive at sufficient ground to proceed against the accused when such accused resides beyond the territorial jurisdiction of the Court."

4a. It is further submitted that the obligation of holding such mandatory enquiry under Section 202 of the CrPC is vested upon the Learned Trial Magistrate. But the Learned Trial Magistrate completely erroneously issued process against the accused. As such, the petitioner/accused filed an application before the Learned Trial Magistrate praying for enquiry under Section 202 of the CrPC which is mandatory in nature but despite the said facts, the Learned Trial Magistrate failed to cure such illegality for salvation of justice. It is also incumbent duty of the Learned Magistrate to rectify such error when the application has been filed by the petitioner but the same was rejected. Not only that, the Learned Magistrate failed to rectify such error even indicated by the petitioner. The Learned Chief Judge also failed to consider the observation of the Hon'ble Apex Court passed in a case **K.S. Joseph Vs. Philips Carbon Block Limited**, 2017 1 SCC(Cri) 270 wherein the Hon'ble Apex Court held that "Postponement of issue of process by Magistrate Purpose of - Held, is to avoid unnecessary harassment to proposed accused Complaint regarding dishonour of cheque under S. 138, NI Act Plea of appellant- accused, that he being resident of area outside territorial jurisdiction of Magistrate who issued summons, an enquiry within meaning of S. 202 CrPC was mandatory, and since that was not done, order of cognizance and issuance of summons was bad in law".

4b. The learned counsel further placed reliance upon several judgments with regard to the enquiry under Section 202 of the CrPC is compulsory as under:

i. **Abhijit Pawar v. Hemant Madhukar Nimbalkar and another**, 2017 AIR(SC) 299;];

ii. **Sunil Todi and Ors. V. State of Gujarat and Anr.**, 2022 AIR(SC) 147, AIROnline 2021 SC 1120;];

iii. Krishna Nand Shastri and Others v. State of Jharkhand,2023 SCCOnLineJhar 517].

4c. It was further submitted that the Learned Sessions Judge also neglected/ignored the observation of the Learned Trial Magistrate to the effect that since the opposite party no. 1 being public servant of Government of West Bengal undertaking so his examination under Section 200 of the CrPC followed by the enquiry in terms of Section 202 of the CrPC was not mandatory in the present case is grossly erroneous finding as such same is liable to be set aside. Section 202 of the CrPC does not discriminate between a public servant and/or a private individual. Hence, in the present case, even if the complainant's examination under Section 200 of the CrPC can

be eliminated because the complainant is public servant but that does not entitle the Court to do so with the enquiry under Section 202 of the CrPC, which is mandatory in nature. In order to see that innocent persons should not be harassed by filing a frivolous application as such, the legislative amended sub-section (1) of Section 202 of the CrPC to make it obligatory upon the Magistrate before summoning the accused residing beyond his jurisdiction, he shall enquire into the case himself or direct investigation is to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there are sufficient grounds for proceeding against accused persons.

4d. Finally, the learned counsel submitted that if the initial action, taken by the Learned Trial Court, is flawed, then all subsequent actions would be flawed as such, the Judgment and Order passed by the Learned Chief Judge as well as Order dated 20th May, 2022 passed by the Learned Trial Magistrate is liable to be set aside. Consequently, the entire proceeding is also liable to be quashed. To bolster his contention, he further placed reliance upon the judgments delivered in the cases as under:

1. **State of Punjab v. Davinder Pal Singh Bhullar and Others**, 2011 14 SCC 770;] reported in and

2. Odi Jerang v. Nabajyoti Baruah & Ors.[(Special Leave to Appeal (Crl) no(s). 2135/2022).]

[5] Per contra, the learned counsel appearing on behalf of the opposite parties vociferously opposed the submission made by the learned counsel appearing on behalf of the petitioner and further argued that the judgments referred by the learned counsel for the petitioner are not at all applicable in the present facts and circumstances of the case. In the present case, complainant is a Public Servant and had filed complaint under Section 138 read with Section 142 of the N.I. Act, 1881 and in those cases, Sections 200 and 202 of the CrPC are not even applicable, when complaint filed by the Public Servant with an affidavit pursuant to Section 145 of the N.I. Act, 1881. It is true that Section 202 of the CrPC was amended for conducting an enquiry before issuing of process which came into effect from 23.06.2006 but such enquiry is not at all applicable if requisite satisfaction can be obtained by the Learned Magistrate from the materials available on the record. Rather, the judgment in Re: expeditious trial of cases under Section 138 of the NI Act, 1881 referred by the learned counsel appearing on behalf of the petitioner is not applicable in the present facts and circumstances.

5a. The complaint was supported by an affidavit. The Learned Trial Court has examined the witness and further relied upon the materials available on the record and after being satisfied himself issued process. According to the amendment provided under Section 145 of the NI Act, 1881, affidavit may be accepted as an evidence during enquiry or trial as a consequence during enquiry under Section 200 of CrPC instead of examining the complainant, a Magistrate can accept the affidavit affirmed

by him. When there is such provision for acceptance of complainant on the basis of affidavit affirmed by him, the compliance of Section 202 of CrPC is not at all required or applicable in respect of the trial of an offence under Section 138 of the NI Act, 1881. Accordingly, the Learned Trial Magistrate had rightly rejected the prayer for enquiry as provided under Section 202 of the CrPC because there is no specific mode and manner of enquiry is provided under Section 202 of the CrPC. The enquiry envisaged under Section 202 of the CrPC, the witnesses are examined whereas under Section 200 of CrPC, the examination of complaint only is necessary with the option of examining the witnesses present, if any. Accordingly, the instant Criminal Revisional application has no merits and is liable to be dismissed.

In support of his submission, he placed reliance upon the judgments delivered in the cases as under:

i. S. S. Binu v. State of West Bengal and another,2018 CRILJ 3769]

ii. **Sunil Todi and Ors. V. State of Gujarat and Anr.**, 2022 AIR(SC) 147, AIROnline 2021 SC 1120;]

iii. M/s. Trend Bags and Another Vs. State of West Bengal and Another[CRR No. 2687 of 2016.]

DISCUSSION AND FINDINGS OF THIS COURT:

[6] In view of the above submissions and arguments made by the learned counsels appearing for the parties and upon perusal of the contents of the complaint and petition as well as order of taking cognizance and issuance of process as well as Judgment and Order passed by the Learned Sessions Court, this Court would like to refer some relevant provisions for ready reference and assessment first herein below before entering into the merits of this case. Those Sections are read as under:

> "Section 200- Examination of complainant. 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
>
> (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 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.

Section 201- Procedure by Magistrate not competent to take cognizance of the case. If the complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall,

(a) if the complaint is in writing, return it for presentation to the proper Court with an endorsement to that effect;

(b) if the complaint is not in writing, direct the complainant to the proper Court.

Section 19 of the Criminal Procedure (Amendment) Act, 2005 has been promulgated by the legislature for amending sub-section (1) of Section 202 CrPC which came into force with effect from June 23, 2006. By virtue of the aforesaid amendment, the word "shall" has been inserted in sub-section (1) of Section 202 Cr.P.C. After the above amendment sub-section (1) of Section 202 Cr.P.C. runs as follows: -

"Section 202- Postponement of issue of process. (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

Section 203- Dismissal of complaint. If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

Section 204- Issue of process. (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be

(a) a summons-case, he shall issue his summons for the attendance of the accused, or (b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87."

Section 145 of the Negotiable Instruments Act, 1881 reads as under:

"Section 145- Evidence on affidavit. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), 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 proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."

[7] In view of the contention of the parties as well as backdrop of the aforesaid relevant provisions of law, this Court has to decide the following issues: -

(i) Whether the amendment of Section 202 of the Code of Criminal Procedure, 1973 as enacted vide Section 19 of the Criminal Procedure (Amendment) Act, 2005 is mandatory in nature while conducting an enquiry under Section 202 of the CrPC before issuing process under Section 204 of the CrPC to an accused, who resides beyond the territorial jurisdiction of the Court of the Trial Magistrate?

(ii) Whether Section 202 of the CrPC is applicable in a case of the Court complaint filed under Sections 138 read with Section 142 of the NI Act, 1881 even supported by an affidavit by the Public Servant?

[8] It is admitted facts that the petitioner resides beyond the territorial jurisdiction of the Court concerned. There is no dispute with regard to the address. Accordingly, it would be necessary to assert whether the Learned Trial Magistrate should follow the provisions of sub-section (1) of Section 202 of the CrPC and for that this Court relied a judgment placed by the opposite parties passed in S. S. Binu v. State of West Bengal and another,2018 CRILJ 3769] where the Division Bench observed in paragraph nos. 61 to 68 as under: -

> "61. The term "inquiry" is defined under Sub-Section (g) of Section 2 Cr.P.C which is quoted below: -
>
> 2.(g) "inquiry" means every inquiry other than trial, conducted under this court by a Magistrate or court."
>
> 62. The above provision purports that every inquiry other than a trial conducted by the Magistrate or court is an inquiry under Section 200, Cr.P.C. Examination of complaint only is necessary with the option of examining the witness present, if any, under the inquiry under Section 202, Cr.P.C., the witnesses are examined for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused.
>
> 63. In **Chandra Deo Singh Vs. P. C. Bose**, 1963 AIR(SC) 1430 a four Judges Bench of the Hon'ble Supreme Court considered Section 202 of the old Criminal Procedure and held as under: -
>
> 8. . . . the object of the provisions of Section 202 (corresponding to present Section 202 of the Code), was to enable the Magistrate to form an opinion as to whether process should be issued or not and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath.
>
> 64. The Hon'ble Supreme Court while considering the objects underlined the provisions of Section 202 Cr.P.C. in **Manharibhai Muljibhai Kakadia & Anr.**, 2012 AIR(SCW) 5314, para 23) (supra) and made the following observations: -

"20. Section 202 of the Code has twin objects; one, to enable the Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an unnecessary, frivolous or meritless complaint and the other, to find out whether there is some material to support the allegations made in the complaint. The Magistrate has a duty to elicit all facts having regard to the interest of an absent accused person and also to bring to book a person or persons against whom the allegations have been made. To find out the above, the Magistrate himself may hold an inquiry under Section 202 of the Code or direct an investigation to be made by a police officer. The dismissal of the complaint under Section 203 is without doubt a pre-issuance of process stage. The Code does not permit an accused person to intervene in the course of inquiry by the Magistrate under Section 202. The legal position is no more res integra in this regard. More than five decades back, this Court in **Vadilal Panchal v. Dattatraya Dulaji Ghadigaonker**, 1960 AIR(SC) 1113) with reference to Section 202 of the Criminal Procedure Code, 1898 (corresponding to Section 202 of the present Code) held that the inquiry under Section 202 was for the purpose of ascertaining the truth or falsehood of the complaint, i.e. for ascertaining whether there was evidence in support of the complaint so as to justify the issuance of process and commencement of proceedings against the person concerned.

65. The amended provision of sub-section (1) of Section 202 CrPC came up for consideration of the Hon'ble Supreme Court in the matter of National Bank of Oman (supra) and the following observation made in the above decision is hereunder: -

9. The duty of a Magistrate receiving a complaint is set out in Section 202, Cr.PC and there is an obligation on the Magistrate to find out if there is any matter which calls for investigation by a criminal court. The scope of enquiry under this section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. Investigation under Section 202, CrPC is different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The scope of enquiry under Section 202, CrPC is, therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint:

(i) on the materials placed by the complainant before the court;

(ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and

(iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defense that the accused may have.

66. In Vijay Dhanuka (2014 AIR SCW 2095, paras 13 and 14) (supra), it has been held that under Section 200, Cr. P.C, examination of complainant only is necessary with the option of examining the witnesses present, if any, whereas in enquiry under Section 202 Cr. P.C., the witnesses are examined for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused. The relevant portion of the above decision is set out below:

17. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry" has been defined under Section 2 (g) of the Code, the same reads as follows: "2. xxx xxx xxx (g) "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court; xxx xxx xxx". It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or Court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any.

18. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code. In the present case, as we have stated earlier, the Magistrate has examined the complainant on solemn affirmation and the two witnesses and only thereafter he had directed for issuance of process. In view of what we have observed above, we do not find any error in the order impugned. In the result, we do not find any merit in the appeals and the same are dismissed accordingly.

67. In **Vijay Dhanuka**, 2014 AIR(SCW) 2095) (supra) the aforesaid principle has been repeated and reiterated in the observation that under Section 200, Cr.P.C. the examining of complainant only is necessary with the option of examining the witnesses present, if any. Though no specific mode or manner of enquiry is provided under Section 202 Cr.P.C., in an enquiry under Section 202, Cr. P.C., the witnesses are examined for the purpose of deciding whether or not there is sufficient ground of proceeding against the accused. The relevant portion of the above decision is quoted below:

14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry" has been defined under Section 2 (g) of the Code, the same reads as follows:

2. (g) 'inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or court,

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code.

15. In the present case, as we have stated earlier, the Magistrate has examined the complainant on solemn affirmation and the two witnesses and only thereafter he had directed for issuance of process.

68. Therefore, keeping in mind the object sought to be achieved by way of amendment of sub-section (1) of Section 202, Cr.P.C., the nature of enquiry as indicated in Section 19 of the Criminal Procedure (Amendment) Act, 2005, the Magistrate concerned is to ward of false complaints against such persons who reside at far of places with a view to save them for unnecessary harassment and the Learned Magistrate concerned is under obligation to find out if there is any matter which calls for investigation by Criminal Court in the light of the settled principles of law holding an enquiry by way of examining the witnesses produced by the complainant or direct an investigation made by a police officer as discussed hereinabove."

The Hon'ble Division Bench of this court finally came to conclusion and answered in following manner in paragraph 100 of the aforesaid judgement as under:

I .

II

III .

IV

V. In cases falling under Section 138 read with section 141 of the N.I.Act, the Magistrate is not mandatorily required to comply with the provisions of

Section 202 (1) before issuing summons to an accused residing outside the territorial jurisdiction of the Learned Magistrate concerned."

[9] Most of the judgments relied on behalf of the petitioner were meticulously considered by the Hon'ble Supreme Court in the case of Sunil Todi and Ors. Vs. State of Gujarat & Anr.,2022 AIR(SC) 47] wherein the Hon'ble Supreme Court while deciding the Issue No. 2 i.e. whether the Magistrate, in view of the Section 202, ought to have postponed the issuance of process in a complaint case filed under Section 138 of the NI Act, 1881 had held thoroughly in paragraphs 31 to 40 as under:

"31. The second submission which has been urged on behalf of the appellants turns upon Section 202 CrPC, which is extracted:

"202. Postponement of issue of process. (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction,] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made, (a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath: Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

32. Under Sub-Section (1) of Section 202, a Magistrate upon the receipt of a complaint of an offence of which he/she is authorized to take cognizance is empowered to postpone the issuance of process against the accused and either (i) enquire into the case; or (ii) direct an investigation to be made by a police officer or by such other person as he thinks fit. The purpose of postponing the

issuance of process for the purposes of an enquiry or an investigation is to determine whether or not there is sufficient ground for proceeding. However, it is mandatory for the Magistrate to do so in a case where the accused is residing at a place beyond the area in which the Magistrate exercises jurisdiction. The accused persons in the present case reside at Aurangabad while the complaint under Section 138 was filed before the Magistrate in Mundra. The argument of the appellants is that in these circumstances, the Magistrate was duty bound to postpone the issuance of process and to either enquire into the case himself or to direct an investigation either by a police officer or by some other person. Section 203 stipulates that if the Magistrate is of the opinion on considering the statement on oath, if any, of the complainant and of the witnesses, and the result of the enquiry or investigation if any under Section 202 that there is no sufficient ground for proceeding, he shall dismiss the complaint recording briefly his reasons for doing so. The requirement of recording reasons which is specifically incorporated in Section 203 does not find place in Section 202. Section 204 which deals with the issuance of process stipulates that if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, he may issue (a) in a summons case, a summons for attendance of the accused; (b) in a warrant case, a warrant or if he thinks fit a summons for the appearance of the accused. These proceedings have been interpreted in several judgments of this Court. For the purpose of the present case, some of them form the subject matter of the submissions by the appellants and the second respondent.

33. The provisions of Section 202 which mandate the Magistrate, in a case where the accused is residing at a place beyond the area of its jurisdiction, to postpone the issuance of process so as to enquire into the case himself or direct an investigation by police officer or by another person were introduced by Act 25 of 2005 with effect from 23 June 2006. The rationale for the amendment is based on the recognition by Parliament that false complaints are filed against persons residing at far off places as an instrument of harassment. In **Vijay Dhanuka v. Najima Mamtaj**, 2014 14 SCC 638: 2014 AIR SCW 2095], this Court dwelt on the purpose of the amendment to Section 202, observing:

"11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process 'in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction' and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a

place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

12. The words 'and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction' were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far-off places in order to harass them. The note for the amendment reads as follows: 'False complaints are filed against persons residing at far-off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction, he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.' The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate."

34. This Court has held that the Magistrate is duty bound to apply his mind to the allegations in the complaint together with the statements which are recorded in the enquiry while determining whether there is a prima facie sufficient ground for proceeding. In **Mehmood UI Rehman v. Khazir Mohammad Tunda**, 2015 12 SCC 420: (AIR 2015 SC 2195)], this Court followed the dictum in **Pepsi Foods Ltd. v. Special Judicial Magistrate**, 1998 5 SCC 749: (AIR 1998 SC 128)] and observed that setting the criminal law in motion against a person is a serious matter. Hence, there must be an application of mind by the Magistrate to whether the allegations in the complaint together with the statements recorded or the enquiry conducted constitute a violation of law. The Court observed:

"20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course. As held by this Court in Pepsi Foods Ltd. v. Judicial Magistrate [**Pepsi Foods Ltd. v. Judicial Magistrate**, 1998 5 SCC 749: 1998 SCC (Cri) 1400] to set in motion the process of criminal law against a person is a serious matter."

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"22. The steps taken by the Magistrate under Section 190(1)(a) CrPC followed by Section 204 CrPC should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court. No doubt, no formal order or a speaking order is required to be passed at that stage. The Code of Criminal Procedure requires speaking order to be passed under Section 203 CrPC when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 CrPC, the High Court under Section 482 CrPC is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before the criminal court as an accused is serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment."

These decisions were cited with approval in **Abhijit Pawar v. Hemant Madhukar Nimbalkar**, 2017 3 SCC 528: AIR 2017 SC 299. After referring to the purpose underlying the amendment of Section 202, the Court observed:

> "25. the amended provision casts an obligation on the Magistrate to apply his mind carefully and satisfy himself that the allegations in the complaint, when considered along with the statements recorded or the enquiry conducted thereon, would prima facie constitute the offence for which the complaint is filed. This requirement is emphasised by this Court in a recent judgment Mehmood Ul Rehman v. Khazir Mohammad Tunda [**Mehmood Ul Rehman v. Khazir Mohammad Tunda**, 2015 12 SCC 420: AIR 2015 SC 2195: (2016) 1 SCC (Cri) 124] "

35. While noting that the requirement of conducting an enquiry or directing an investigation before issuing process is not an empty formality, the Court relied on the decision in Vijay Dhanuka which had held that the exercise by the Magistrate for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused is nothing but an enquiry envisaged under Section 202 of the Code.

36. In **Birla Corporation Ltd. v. Adventz Investments and Holdings**, 2019 16 SCC 610: AIR 2019 SC 2390], the earlier decisions which have been referred to above were cited in the course of the judgment. The Court noted:

> "26. The scope of enquiry under this section is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should be issued or not under Section 204 CrPC or whether the complaint should be dismissed by resorting to Section 203 CrPC on the footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any. At the stage of enquiry under Section 202 CrPC, the Magistrate is only concerned with the allegations made in the complaint or the evidence in support of the averments in the complaint to satisfy himself that there is sufficient ground for proceeding against the accused."

Hence, the Court held:

> "33. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The application of mind has to be indicated by disclosure of mind on the satisfaction. Considering the duties on the part of the Magistrate for issuance of summons to the accused in a complaint case and that there must be sufficient indication as to the application of mind and observing that the Magistrate is not to act as a post office in taking cognizance of the complaint,

in Mehmood Ul Rehman [**Mehmood Ul Rehman v. Khazir Mohammad Tunda**, 2015 12 SCC 420: (2016) 1 SCC (Cri) 124] "

The above principles have been reiterated in the judgment in **Krishna Lal Chawla v. State of U.P**, 2021 5 SCC 435: AIR 2021 SC 1381].

37. In this backdrop, it becomes necessary now to advert to an order dated 16 April 2021 of a Constitution Bench in Re: Expeditious Trial of Cases under Section 138 of N.I. Act 1881 [Suo Motu Writ Petition (Cri) No. 2 of 2020, decided on 16 April 2021 (Reported in AIR 2021 SC 1957]. The Constitution Bench notes "the gargantuan pendency of complaints filed under Section 138" and the fact that the "situation has not improved as courts continue to struggle with the humongous pendency". The court noted that there were seven major issues which arose from the responses filed by the State Governments and the Union Territories including in relation to the applicability of Section 202 of the CrPC. Section 143 of the NI Act provides that Sections 262 to 265 of the CrPC (forming a part of Chapter XXI dealing with summary trials) shall apply to all trials for offences punishable under Section 138 of the NI Act. On the scope of the inquiry under Section 202 CrPC in cases under Section 138 of the NI Act, there was a divergence of view between the High Courts. Some High Courts had held that it was mandatory for the Magistrate to conduct an inquiry under Section 202 CrPC before issuing process in complaints filed under Section 138, while there were contrary views in the other High Courts. In that context, the Court observed:

"10. Section 202 of the Code confers jurisdiction on the Magistrate to conduct an inquiry for the purpose of deciding whether sufficient grounds justifying the issue of process are made out. The amendment to Section 202 of the Code with effect from 23.06.2006, vide Act 25 of 2005, made it mandatory for the Magistrate to conduct an inquiry before issue of process, in a case where the accused resides beyond the area of jurisdiction of the court. (See: Vijay Dhanuka & Ors. v. Najima Mamtaj & Ors. 1, Abhijit Pawar v. Hemant Madhukar Nimbalkar and Anr. and Birla Corporation Limited v. Adventz Investments and Holdings Limited & Ors.). There has been a divergence of opinion amongst the High Court's relating to the applicability of Section 202 in respect of complaints filed under Section 138 of the Act. Certain cases under Section 138 have been decided by the High Court's upholding the view that it is mandatory for the Magistrate to conduct an inquiry, as provided in Section 202 of the Code, before issuance of process in complaints filed under Section 138. Contrary views have been expressed in some other cases. It has been held that merely because the accused is residing outside the jurisdiction of the court, it is not necessary for the Magistrate to postpone the issuance of process in each and every case. Further, it has also been held that not

conducting inquiry under Section 202 of the Code would not vitiate the issuance of process, if requisite satisfaction can be obtained from materials available on record.

11. The learned Amici Curiae referred to a judgment of this Court in **K.S. Joseph v. Philips Carbon Black Ltd & Anr.**, 2016 AIR(SC) 2149). where there was a discussion about the requirement of inquiry under Section 202 of the Code in relation to complaints filed under Section 138 but the question of law was left open. In view of the judgments of this Court in Vijay Dhanuka (supra), Abhijit Pawar (supra) and Birla Corporation (supra), the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot be dispensed with. The learned Amici Curiae recommended that the Magistrate should come to a conclusion after holding an inquiry that there are sufficient grounds to proceed against the accused. We are in agreement with the learned Amici."

38. Section 145 of the NI Act provides that evidence of the complainant may be given by him on affidavit, which shall be read in evidence in an inquiry, trial or other proceeding notwithstanding anything contained in the CrPC. The Constitution Bench held that Section 145 has been inserted in the Act, with effect from 2003 with the laudable object of speeding up trials in complaints filed under Section 138. Hence, the Court noted that if the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. Consequently, it was held that Section 202(2) CrPC is inapplicable to complaints under Section 138 in respect of the examination of witnesses on oath. The Court held that the evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses and in suitable cases the Magistrate can examine documents to be satisfied that there are sufficient grounds for proceeding under Section 202.

39. In the present case, the Magistrate has adverted to:

(i) The complaint;

(ii) The affidavit filed by the complainant;

(iii) The evidence as per evidence list and; and

(iv) The submissions of the complainant.

40. The order passed by the Magistrate cannot be held to be invalid as betraying a non-application of mind. In **Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal**, 2003 4 SCC 139: AIR 2003 SC 1900], this Court has held that in determining the question as to whether process is to be issued, the Magistrate has to be satisfied whether there is sufficient ground for

proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can only be determined at the trial.

[See also in this context the decision in **Bhushan Kumar v. State (NCT of Delhi)**, 2012 5 SCC 424: AIR 2012 SC 1747]."

[10] Over all consideration of the arguments made by the parties and judgments referred above by the parties and upon perusal of all orders passed by the Learned Metropolitan Magistrate, this Court finds that the Learned Chief Metropolitan Magistrate has carefully perused the complaint supported by an affidavit and documents, taken cognizance and further transferred the case to Learned Metropolitan Magistrate, 16th Court for enquiry and disposal under Section 192 (1) CrPC.

[11] On 13.03.2006, the complainant was examined by the Learned Metropolitan Magistrate under Section 200 of the CrPC and adverted to:

(a) The complaint;

(b) The affidavit filed by the complainant;

(c) The original documents in support of the complaint;

(d) The submissions of the Ld. advocate for the complainant.

And finally satisfied that there are sufficient grounds for proceeding against the accused person under Section 138 read with Section 142 of the N.I. Act, 1881 and issued summon to the accused person. Moreover, accused person appeared through his learned Advocates. On 12.09.2019, a plea under Section 251 of the Code of Criminal Procedure was taken and the matter was fixed for evidence. The complainant was examined on 04.12.2019 and 20.01.2021 and the matter was fixed for cross-examination. Thereafter, at the stage of cross-examination, the accused person filed petition after more than a year on 05.04.2022 for examination under Section 202 of the CrPC. In addition, it is admitted fact that the complaint has been filed by a Public Servant of West Bengal Essential Commodities Supply Corporation Ltd., a Government of West Bengal Undertaking Company. The complainant was acting or purporting to act in discharge of his official duties. Therefore, the Impugned Order dated 20.05.2022 passed by the Learned Metropolitan Magistrate cannot be held to be invalid or incorrect. This Court does not find any infirmity far less any jurisdictional error in the Order impugned. The judgment delivered in the cases of **S.S. Binu V. State of West Bengal and another**, 2018 CrlJ 3769 and Sunil Todi and Ors. Vs. State of Gujarat & Anr.,2022 AIR(SC) 47 are squarely applicable in the present facts and circumstances of the instant case. Hence, this Court endorsed the concurrent findings of both the Learned Trial Court and Learned Sessions Judge.

[12] Accordingly, C.R.R. 3849 of 2022 is, thus, dismissed. Connected applications, if any, are also, thus, disposed of.

[13] Case Diary, if any, is to be returned to the learned Counsel for the State.

[14] Interim order, if any, stands vacated.

[15] Let a copy of this judgment be sent to the learned Court below for information.

[16] Parties will act on the server copies of this judgment uploaded on the official website of this Court.

[17] Urgent photostat certified copy of this judgment, if applied for, is to be given as expeditiously to the parties on compliance of all legal formalities

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2024(2)GDCJ523

HIGH COURT OF ANDHRA PRADESH: AMARAVATI

[Before B V L N Chakravarthi]

Criminal Petition No 6385 of 2024 **dated 13/09/2024**

Jamisetti Venkata Subrahmanyam

Versus

State of Andhra Pradesh and Others

DEPOSIT OF COMPENSATION

Code of Criminal Procedure, 1973 Sec. 482, Sec. 389 - Negotiable Instruments Act, 1881 Sec. 148, Sec. 138 - Bharatiya Nagarik Suraksha Sanhita, 2023 Sec. 430 - Deposit of Compensation - Petitioner sought to quash the appellate court's order directing him to deposit 20% of the compensation amount in an appeal against conviction under Section 138 of the Negotiable Instruments Act - Petitioner argued that the order was unjust - Court referred to Section 148 of the Act, which grants discretion to the appellate court to impose such a condition, except in exceptional cases - Held that appellate courts must record reasons if they decide not to impose the deposit condition - Petition allowed, and the case remanded for reconsideration. - Petition Allowed

Law Point: In appeals against convictions under Section 138 of the Negotiable Instruments Act, appellate courts are generally justified in requiring a deposit of 20% of the compensation amount unless exceptional circumstances are demonstrated, in which case reasons for deviation must be recorded.

ફોજદારી કાર્યરીતિ સંહિતા, 1973 કલમ 482, કલમ 389 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 સે. 148, કલમ 138 - ભારતીય નાગરિક સુરક્ષા સંહિતા, 2023 કલમ 430 - વળતરની થાપણ - અરજદારે નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટની કલમ 138 હેઠળ

દોષિત ઠેરવવા સામેની અપીલમાં વળતરની રકમના 20 ટકા જમા કરાવવાનો નિર્દેશ આપતા એપેલેટ કોર્ટના આદેશને રદ્દ કરવાની માંગ કરી હતી - અરજદારે દલીલ કરી હતી કે આદેશ અન્યાયી છે - કોર્ટે કાયદાની કલમ 148 નો ઉલ્લેખ કર્યો છે જે અપવાદરૂપ કિસ્સાઓ સિવાય અપીલ કોર્ટને આવી શરત લાદવા માટે વિવેકાધીન સત્તા આપે છે – ઠેરવયું કે, અપીલ અદાલતોએ જો તેઓ ડિપોઝિટની શરત લાદવાનો નિર્ણય ન લે તો તેઓએ કારણોની નોંધ કરવી આવશ્યક છે - કેસને પુનર્વિચારણા માટે રિમાન્ડ પર લેવામાં આવ્યો છે. - અરજી મંજૂર

કાયદાનો મુદ્દો: નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ્સ એક્ટની કલમ 138 હેઠળ દોષિત ઠેરવવામાં આવેલી અપીલમાં અપીલ અદાલતો સામાન્ય રીતે વળતરની રકમના 20% ડિપોઝિટની જરૂરિયાતને ન્યાયી ઠેરવે છે સિવાય કે અસાધારણ સંજોગો દર્શાવવામાં આવ્યા હોય જેમાં વિચલનનાં કારણો નોંધવામાં આવેલ હોવા જોઈએ.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 482, Sec. 389
Negotiable Instruments Act, 1881 Sec. 148, Sec. 138
Bharatiya Nagarik Suraksha Sanhita, 2023 Sec. 430

Counsel:

Manda Venkateswara Rao

JUDGEMENT

B V L N Chakravarthi, J.- [1] This Criminal Petition is filed by the petitioner/Appellant, under Section 482 of Code of Criminal Procedure, 1973, seeking to quash the order dated 10.07.2024 passed in Crl.M.P.No.451 of 2024 in Crl.A.No.135 of 2024, on the file of IV Addl.Sessions Judge, Tanuku, West Godavari District.

[2] Heard learned counsel for the petitioner and learned Assistant Public Prosecutor representing the State.

[3] Learned counsel for the petitioner would submit that learned Sessions Judge in the appeal against the conviction for the offence punishable under Section 138 of Negotiable Instruments Act passed the impugned order dated 10.07.2024 in Crl.M.P.No.451 of 2024 under Section 389(1) Cr.P.C., directed the petitioner to deposit 20% of the compensation amount ordered by the learned Trial Judge within a period of six (60) days from the date of the order, while suspending the sentence of imprisonment awarded by the learned Magistrate. He would submit that the order of

the learned Sessions Judge is not in accordance with **Jamboo Bhandari v. MP State Industrial Development Corporation Ltd's** case.

[4] The learned Assistant Public Prosecutor takes notice for the State and would submit that the Appellate Court has power to order the appellant to deposit such sum, which shall be a minimum of 20% of the fine or compensation amount awarded by the trial Court in an appeal against the conviction U/s.138 of Negotiable Instruments Act.

[5] Section 148 of Negotiable Instruments Act is as under:

S. 148

Power of Appellate Court to order payment pending appeal against conviction

1. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, in an appeal by the drawer against conviction under section 138, the Appellate Court may order the appellant to deposit1 such sum which shall be a minimum of twenty percent of the fine or compensation awarded by the trial Court:

Provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant under section 143A.

2. The amount referred to in sub-section (1) shall be deposited within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

3. The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal:

Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

[6] The Hon'ble Supreme Court in the case of **Surinder Singh Deswal @ Colonel S.S.Deswal and others**, 2019 11 SCC 341 , on section 148 of Negotiable Instruments Act held as under:

> "Now so far as the submission on behalf of the appellants that even considering the language used in Section 148 of the NI Act as amended, the appellate court "may" order the appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial court and the word used is not "shall" and therefore the discretion is vested with the first appellate court has construed it as mandatory, which according to the learned Senior Advocate for the appellants would be contrary to the provisions of Section 148 of the NI Act as amended is concerned, considering the amended

Section 148 of the NI Act as a whole to be read with the Statement of Objects and Reasons of the amending Section 148 of the NI Act, the word used is "may", it is generally to be construed as a "rule" or "shall" and not to direct to deposit by the appellate court is an exception for which special reasons are to be assigned.

Therefore amended Section 148 of the NI Act confers power upon the appellate court to pass an order pending appeal to direct the appellant-accused to deposit the sum which shall not be less than 20% of the fine or compensation either on an application filed by the original complainant or even on the application file by the appellant-accused under Section 389 Cr.P.C. to suspend the sentence. The aforesaid is required to be construed considering the fact that as per the amended Section 148 of the NI Act, a minimum of 20% of the fine or compensation awarded by the trial court is directed to be deposited and that such amount is to be deposited within a period of 60 days from the date of the order, or within such further period not exceeding 30 days as may be directed by the appellate court for sufficient cause shown by the appellant.

Therefore, if amended Section 148 of the NI Act is purposively interpreted in Section 148 of the NI Act, but also Section 138 of the NI Act. The Negotiable Instruments Act has been amended from time to time so as to provide, inter alia, speedy disposal of cases relating to the offence of the dishonour of cheques. So as to see that due to delay tactics by the unscrupulous drawers of the dishonoured cheques due to easy filing of the appeals and obtaining stay in the proceedings, an injustice was caused to the payee of a dishonoured cheque, who has to spend considerable time and resources in the court proceedings to realise the value of the cheque and having observed that such delay has compromised the sanctity of the cheque transactions. Parliament has thought it fit to amend Section 148 of the NI Act. Therefore, such a purposive interpretation would be in furtherance of the Objects and Reasons of the amendment in Section 148 of the NI Act and also Section 138 of the NI Act."

[7] The Hon'ble Supreme Court in Jamboo Bhandari Vs. M.P.State Industrial Development Corporation Limited and Others,2023 LiveLaw(SC) 776 , referring above para in the case of **Surinder Singh Deswal @ Colonel S.S.Deswal and others,** held in paras 6 to 9 as under:

"6. What is held by this Court is that a purposive interpretation should be made of Section 148 of the N.I. Act. Hence, normally, Appellate Court will be justified in imposing the condition of deposit as provided in Section 148. However, in a case where the Appellate Court is satisfied that the condition of deposit of 20% will be unjust or imposing such a condition will amount to

deprivation of the right of appeal of the appellant, exception can be made for the reasons specifically recorded.

7. Therefore, when Appellate Court considers the prayer under Section 389 of the Cr.P.C. of an accused who has been convicted for offence under Section 138 of the N.I. Act, it is always open for the Appellate Court to consider whether it is an exceptional case which warrants grant of suspension of sentence without imposing the condition of deposit of 20% of the fine/compensation amount. As stated earlier, if the Appellate Court comes to the conclusion that it is an exceptional case, the reasons for coming to the said conclusion must be recorded.

8. The submission of the learned counsel appearing for the original complainant is that neither before the Sessions Court nor before the High Court, there was a plea made by the appellants that an exception may be made in these cases and the requirement of deposit or minimum 20% of the amount be dispensed with. He submits that if such a prayer was not made by the appellants, there were no reasons for the Courts to consider the said plea.

9. We disagree with the above submission. When an accused applies under Section 389 of the Cr.P.C. for suspension of sentence, he normally applies for grant of relief of suspension of sentence without any condition. Therefore, when a blanket order is sought by the appellants, the Court has to consider whether the case falls in exception or not."

[8] Therefore, in the light of above judgments of the Hon'ble Supreme Court, normally, the Appellate Court will be justified in imposing condition of deposit as provided in section 148 of N.I.A.ct. However, in a case, whether the Appellate Court is satisfied with the condition of deposit of 20% will be unjust, exception can be made for the reason specifically recorded. Hence, when the Appellate Court considers an application filed U/s.389(1) Cr.P.C. corresponding to Section 430 of BNSS by the drawer of the cheque (accused), who was convicted for the offence U/s.138 of Negotiable Instruments Act, the Appellant Court has to consider whether it is exceptional case which warrants grant of suspension of sentence without imposing condition of deposit of 20% of fine/compensation amount. If the Appellate Court comes to said conclusion that it is an exceptional case, reasons for coming to such conclusion must be recorded.

[9] In the case on hand, the impugned order of the learned Appellate Court does not disclose anything that the learned Appellate Court considered whether the cases in the exception or not? i.e., whether it warrants grant of suspension of sentence without imposing the condition of deposit of 20% of the fine/compensation amount?

[10] In those circumstances, the impugned order of the learned Appellate Court is set side and restored the application filed by the appellant U/s.389(1) Cr.P.C.,

corresponding to section 430 of BNSS before the Appellate Court. The petitioner/accused shall appear before the learned Appellate Court in 10 (ten) days from the date of receipt of copy of this order. On such appearance, the learned Appellate Court shall consider the application afresh and dispose of the same as expeditiously as possible, preferably within seven (07) days. Till then, the sentence imposed by the learned trial Court stands suspended. If the petitioner/accused fails to appear before the learned Appellate Court as directed above, the Criminal Petition stands dismissed without recourse to the Court.

[11] Accordingly, the Criminal Petition is disposed of at the stage of admission.

As a sequel, miscellaneous applications pending, if any, shall stand closed

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2024(2)GDCJ528

IN THE HIGH COURT OF KERALA AT ERNAKULAM

[Before M B Snehalatha]

Criminal Revision Petition No 1149 of 2018 **dated 13/09/2024**

Salim A

Versus

State of Kerala; S Purushothaman Nair

STOP PAYMENT CHEQUE

Code of Criminal Procedure, 1973 Sec. 357 - Negotiable Instruments Act, 1881 Sec. 118, Sec. 139, Sec. 138, Sec. 142 - Stop Payment Cheque - Petitioner challenged conviction under Section 138 of the Negotiable Instruments Act, arguing that the cheque in question was misused after he had issued stop payment instructions to the bank - Complainant claimed that the cheque was issued in discharge of a debt of Rs.3 lakhs - Court observed that stop payment instructions by the drawer would not negate liability under Section 138 unless the accused proves that there was no existing debt or sufficient funds were available at the time - Conviction upheld - Petition Dismissed

Law Point: Stop payment instructions do not exempt a drawer from liability under Section 138 of the Negotiable Instruments Act unless it is proven that there was no debt or sufficient funds existed to cover the cheque at the time of presentation.

ફોજદારી કાર્યરીતિ સંહિતા, 1973 કલમ 357 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 કલમ 118, કલમ 139, કલમ 138, કલમ 142 - ચેક ની ચુકવણી સ્ટોપ કરાવેલ - અરજદારે નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટની કલમ 138 હેઠળ દોષિત ઠેરવવાને પડકાર્યો હતો જેમાં દલીલ કરવામાં આવી હતી કે બેંકને સ્ટોપ પેમેન્ટ સૂચનાઓ જારી કર્યા પછી

પ્રશ્નમાં ચેકનો દુરુપયોગ કરવામાં આવ્યો હતો - ફરિયાદીએ દાવો કર્યો હતો કે ચેક રૂ.3 લાખનું દેવું ચૂકવવા માટે જારી કરવામાં આવ્યો હતો - કોર્ટે અવલોકન કર્યું હતું કે ડ્રોઅર દ્વારા સ્ટોપ પેમેન્ટ સૂચનાઓ કલમ 138 હેઠળની જવાબદારીને નકારી શકશે નહીં સિવાય કે આરોપી સાબિત કરે કે તે સમયે કોઈ હાલનું દેવું નથી અથવા પૂરતું ભંડોળ ઉપલબ્ધ હતું - દોષી ઠેરવવાનું માન્ય રાખ્યું - અરજી નામંજૂર

કાયદાનો મુદ્દો: ચુકવણી અટકાવવાની સૂચનાઓ નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ્સ એક્ટની કલમ 138 હેઠળ ડ્રોઅરને જવાબદારીમાંથી મુક્તિ આપતી નથી સિવાય કે તે સાબિત થાય કે પ્રસ્તુતિ સમયે ચેકને આવરી લેવા માટે કોઈ દેવું અથવા પર્યાપ્ત ભંડોળ અસ્તિત્વમાં નથી.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 357

Negotiable Instruments Act, 1881 Sec. 118, Sec. 139, Sec. 138, Sec. 142

Counsel:

Poovappally M Ramachandran Nair, K Rajesh Kannan, A S Shammy Raj, Maya M N

JUDGEMENT

M.B. Snehalatha, J.- [1] Revision Petitioner is the accused in C.C.No.346/2014 on the file of Judicial First Class Magistrate Court-IV (Mobile Court), Thiruvananthapuram. He assails the judgment in Crl.A No.219/2016 of Additional Sessions Court-II, Thiruvananthapuram which confirmed the conviction and sentence against him in C.C No.346/2014 for the offence punishable under Section 138 of Negotiable Instrument Act, 1881 (hereinafter referred to as 'NI Act').

[2] The parties shall be referred to as complainant and accused.

[3] The case of the complainant in brief is that Ext.P1 cheque issued by the accused in discharge of the liability of the accused to pay an amount of Rs.3 lakhs was bounced stating the reason "payment stopped by the drawer". In spite of receipt of Ext.P4 lawyer notice, accused neither sent any reply nor paid the amount covered by Ext.P1 cheque. Accused thereby committed the offence punishable under Section 138 of N.I Act.

[4] Accused pleaded not guilty to the accusation and denied issuance of Ext.P1 cheque in discharge of any debt or liability. His defence was that complainant, who was an employee in his shop, misused one of the signed blank cheques entrusted in connection with his business.

[5] Before the trial court, PWs 1 to 3 were examined on the side of the complainant and Exts.P1 to P15 were marked. Accused got himself examined as DW1. DW2 was examined on his side. Exts.D1 to D6 were also marked.

[6] After trial, the learned Magistrate found the accused guilty under Section 138 N.I Act and he was convicted and sentenced to undergo imprisonment till rising of the court and to pay a compensation of Rs.3 lakhs to the complainant under Section 357(3) Cr.P.C with a stipulation that in default of payment of compensation, accused shall undergo simple imprisonment for three months. The appeal preferred by the accused as Crl.A.No.219/2016 was dismissed by the Sessions Court by confirming the conviction and sentence.

[7] Admittedly, Ext.P1 is a cheque issued from the account maintained by the accused with the Corporation Bank, Vellayambalam Branch, Thiruvananthapuram. The accused would also admit his signature in Ext.P1 cheque. Exts.P2 is the memo issued from the Bank. Ext.P2 would show that Ext.P1 cheque was dishonoured for the reason "payment stopped by the drawer". Ext.P4 would reveal that upon receipt of Ext.P2 memo from the Bank, the complainant caused to issue lawyer notice to the accused intimating the factum of dishonour of Ext.P1 cheque and demanding the amount covered by Ext.P1 cheque.

[8] The version of the complainant who was examined as PW1 is that on 26.01.2013, accused borrowed Rs.3 lakhs from him to meet the marriage expenses of the daughter of accused and in discharge of the said debt, accused issued a cheque dated 28.01.2013 drawn on Vijaya Bank. Though he presented the said cheque for collection, it was bounced due to 'insufficient funds' in the account of the accused. Ext.P3 is the memo received from the bank. His further version is that when he intimated the factum of dishonour of the said cheque, the accused issued another cheque namely Ext.P1 cheque dated 15.2.2013 drawn on Corporation Bank, Vellayambalam Branch, Thiruvananthapuram. According to PW1, though he presented Ext.P1 cheque for collection, it was also returned dishonoured stating the reason "Payment Stopped by the Drawer". Ext.P2 is the memo received from the Bank.

[9] Per contra, the defence canvassed by the accused is that complainant was an employee in 'Bismillah Cold Storage' run by him; that he had entrusted signed blank cheques with the complainant and one such blank signed cheque was misused by the complainant. His case is that there was a property transaction between himself and the complainant whereby, he purchased the property of the complainant for a sale consideration of Rs.20 lakhs. Subsequent to the execution of the said sale deed, complainant demanded an additional sale consideration of Rs.3 lakhs by saying that the property would fetch more price. When the accused refused to oblige to the said demand for additional sum, complainant misused one of the blank signed cheques entrusted with him in connection with the business purpose.

[10] To substantiate his defence, accused got himself examined as DW1. DW2 was also examined on his side. Exts.D1 to D6 were also marked.

[11] Ext.P14 would reveal that there was a property transaction between the complainant and the accused whereby the accused purchased the property owned by the complainant for a sale consideration of Rs.20 lakhs. According to the complainant, he received the entire sale consideration of Rs.20 lakhs.

[12] Though the accused would contend that the complainant was an employee of the Cold Storage and Meat Stall run by him, there is no acceptable evidence to show that the complainant was an employee under him. There is no acceptable evidence in support of the defence canvassed by the accused that he had entrusted blank cheque leaves with the accused for his business purposes and one such cheque leaf was misused by the complainant. The testimony of DW2 do not in any way help the accused in substantiating his defence. On the other hand, the evidence adduced by the complainant would reveal that the accused borrowed an amount of Rs.3 lakhs from the complainant on 26.1.2013 and in discharge of the said debt, he issued a cheque dated 28.1.2013 for Rs.3 lakhs drawn on Vijaya Bank, Vellayambalam Branch and on presentation, the said cheque was bounced. Exts.P8 and P3 fortifies the version of the complainant that the cheque dated 28.1.2013 drawn on Vijaya Bank, Vellayambalam Branch issued by the accused was dishonoured for lack of funds in the account of accused. It has also come out in evidence that when the accused was informed about the dishonour of cheque dated 28.1.2013 drawn on Vijaya Bank, Vellayambalam Branch, he issued another cheque namely Ext.P1 cheque dated 15.2.2013 for Rs.3 lakhs drawn on Corporation Bank, Vellayabalam Branch. Ext.P2 memo would show that Ext.P1 cheque issued by the accused was also dishonoured upon presentation for the reason 'payment stopped by the drawer'.

[13] The complainant has established the factual basis for raising the presumption under Section 118(a) and 139 of N.I Act. Of course, it is a rebuttable presumption. Accused has not succeeded in rebutting the said presumption as rightly held by the learned Magistrate and confirmed by the learned appellate court. It is obligatory for the court to raise the presumption under Section 139 of N.I Act, which is a presumption of law. If there was no debt or liability as contended by the accused, he could have sent a reply to Ext.P4 lawyer notice. The conduct of the accused in not sending any reply to Ext.P4 notice speaks volumes in the facts and circumstances of the case.

[14] The object of Chapter XVII comprising Section 138 to 142 of the N.I. Act was aimed at inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. A negotiable instrument is a solemn document which carries with it a representation to the holder in due course of any such instrument but also a promise that the same shall be honoured for payment. Section 139 of the Negotiable Instruments Act mandates that unless the contrary is proved, it is to be presumed that a holder of a cheque, received the cheque

of the nature referred to in Section 138 of N.I. Act for the discharge in whole or in part of any debt or liability. The said presumption is a rebuttable one. However, the onus of proving that the cheque was not in discharge of any debt or other liability is on the accused/drawer of the cheque. It is to be borne in mind that Section 138 of N.I Act while making dishonour of a cheque an offence also provides for safeguards to protect the drawers of such instrument where dishonour may take place for the reasons other than those arising out of dishonest intentions. It mandates service of a notice upon the drawer of the cheque calling upon him to make the payment covered by the cheque and permits prosecution only after the expiry of the statutory period and upon failure of the drawer to make the payment within the said period.

[15] A question arises as to whether the dishonour of the cheque would constitute an offence only in two contingencies referred to in Section 138 and none else. The two contingencies referred to in Section 138 of N.I. Act are (i) whether the cheque was returned by the bank unpaid because of the amount of money standing to the credit of that account is insufficient to honour the cheque (ii) that it exceeds the amount arranged to be paid from that account by an agreement made with that bank.

[16] Hence the question is, in a case where cheque is returned by the bank unpaid on the ground that 'payment stopped by the drawer', would it constitute an offence under Section 138 of N.I Act?

[17] If the argument that dishonour of the cheque for the reason 'payment stopped by the drawer' could not constitute an offence under Section 138 N.I Act is accepted, it will make Section 138 of N.I Act redundant and in such a case by giving instruction to the bank to stop payment immediately after issuing a cheque against a debt or liability, the drawer can easily get rid of the penal consequences envisaged therein. The drawer of a cheque may practice many ingenious methods of avoiding payment.

[18] In **Electronics Trade and Technology Development Corporation Ltd. Secunderabad v. Indian Technologists and Engineers (Electronics) Pvt.Ltd. and another**, 1996 2 SCC 739, the Apex Court held as follows:

> "It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (1) in this case, "I refer to the drawer" (2) "instructions for stoppage of payment" and (3) "stamp exceeds arrangement", it amounts to dishonour within the meaning of Section 138 of the Act. On issuance of the notice by the payee or the holder in due course after dishonour, to the drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption of dishonest intention, subject to any other liability, stands satisfied."

[19] In **M/s.Modi Cements Ltd v. Shri.Kuchil Kumar Nandi**, 1998 3 SCC 249 a question arose before the Apex Court as to whether dishonour of a cheque on the ground that the drawer had stopped payment was a dishonour punishable under Section 138 of N.I. Act. The Apex Court held that if the proposition that dishonour of cheque for the reason 'payment stopped by the drawer' could not constitute an offence under Section 138 N.I Act is accepted, it will make Section 138 N.I Act a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or a liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed.

[20] In **M.M.T.C Ltd. and another v. Medchl Chemicals and Pharma (P) Ltd. and another**, 2002 1 SCC 234 the Apex Court held that even in cases where the dishonour of the cheque was on account of stop payment instruction of a drawer, a presumption regarding a cheque being for consideration would arise under Section 139 of N.I Act and an offence under Section 138 N.I Act could still be made out. The accused can establish that stop payment instructions were not issued due to insufficiency or paucity of funds. If the accused establishes that there were sufficient funds in his account to clear the amount of the cheque at the time of presentation of cheque for encashment at the drawer bank and that the stop payment notice had been issued due to other valid reasons including that there was no existing debt or liability at the time of presentation of cheque for encashment, then the offence under Section 138 would not be made out. The burden to prove such facts is on the accused. In **Goaplast (P) Ltd. v. Chico Ursula D souza and another**, 2003 3 SCC 232 the Hon'ble Apex Court held that stop payment instructions and consequent dishonour of cheque attracts the offence under Section 138 N.I Act. The Apex Court observed as follows:

> "This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong."

[21] In Laxmi Dyechem vs. State of Gujarat and Ors.,MANU/SC/1030/2012 the Hon'ble Apex Court held thus:

> "The net effect is that dishonour on the ground that the payment has been stopped, regardless whether such stoppage is with or without notice to the drawer, and regardless whether the stoppage of payment is on the ground that the amount lying in the account was not sufficient to meet the requirement of the cheque, would attract the provisions of Section 138."

[22] The evidence on record would show that Ext.P1 cheque issued by the accused in discharge of his liability to pay an amount of Rs.3 lakhs to the complainant was dishonoured stating the reason 'payment stopped by the drawer'. Ext.P12 statement of account of the accused would reveal that at the time when Ext.P1 cheque came for collection in the bank, there was no sufficient funds in the account of the accused to honour Ext.P1 cheque.

[23] The learned Magistrate and the learned Sessions Judge have appreciated the evidence in its correct perspective and reached at the right finding that the accused has committed the offence under Section 138 N.I Act. Therefore, this Court finds no reason to interfere with the finding of conviction and order of sentence passed against the accused.

The revision petition is devoid of any merit and accordingly dismissed.

The trial court shall take steps to execute the sentence.

Registry shall transmit the records to the trial court forthwith

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2024(2)GDCJ534

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before S V Pinto]

Criminal Miscellaneous Application (For Leave To Appeal); Criminal Appeal No 9541 of 2023; 1238 of 2023 **dated 10/09/2024**

Jayantibhai Naranbhai Patel

Versus

State of Gujarat & Ors

ACQUITTAL IN CHEQUE DISHONOR

Code of Criminal Procedure, 1973 Sec. 378 - Negotiable Instruments Act, 1881 Sec. 139 - Sec. 138 - Acquittal in Cheque Dishonor - Application filed under Sec. 378(4) of Cr.P.C. challenging acquittal in cheque dishonor case - Respondents allegedly failed to pay enforceable debt - Cheque issued for Rs. 1,50,000/- dishonored due to insufficient funds - Trial Court acquitted respondents, holding cheque was given as security without sufficient evidence - Applicant argued that all required evidence was provided, including agreements and cheques - Court did not properly consider Memorandum of Agreement and evidence - Leave to appeal granted as presumption under Sec. 139 N.I. Act not rebutted - Appeal Allowed

Law Point: In cases of cheque dishonor under Sec. 138 of N.I. Act, presumption favors the holder unless rebutted by the accused with cogent evidence, and the agreements and financial transactions must be considered in totality

ફોજદારી કાર્યરીતીની સંહિતા, ૧૯૭૩ સેક. ૩૭૮ - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ્સ એક્ટ, ૧૮૮૧ સેક. ૧૩૯ - સેક. ૧૩૮ - ચેક પરત ફર્યામાં નિર્દોષ છુટકારો - સીઆરપીસી કલમ ૩૭૮(૪) હેઠળ ચેક અપમાનના કેસમાં નિર્દોષ છુટકારાને પડકારતી અરજી દાખલ - પ્રતિવાદીઓ કથિત રીતે અમલપાત્ર દેવું ચૂકવવામાં નિષ્ફળ ગયા - ચેક રૂ. ૧,૫૦,૦૦૦/- અપૂરતા ભંડોળને કારણે અપમાનિત - ટ્રાયલ કોર્ટે પ્રતિવાદીઓને નિર્દોષ જાહેર કર્યા, પર્યાપ્ત પુરાવા વિના સુરક્ષા તરીકે હોલ્ડિંગ ચેક આપવામાં આવ્યો - અરજદારે દલીલ કરી હતી કે એગ્રીમેન્ટ અને ચેક સહિત તમામ જરૂરી પુરાવા આપવામાં આવ્યા હતા - કોર્ટે મેમોરેન્ડમ ઓફ એગ્રીમેન્ટ અને પુરાવાઓને યોગ્ય રીતે ધ્યાનમાં લીધા નથી - N I અધિનિયમ ધારા ૧૩૯ હેઠળ અનુમાન તરીકે મંજૂર કરાયેલ અપીલની રજા રદ કરવામાં આવી નથી - અપીલની મંજૂરી છે

કાયદાનો મુદ્દો: N I કાયદાની કલમ ૧૩૮ હેઠળ ચેકના અપમાનના કેસોમાં, ધારણા ધારકની તરફેણ કરે છે સિવાય કે આરોપી દ્વારા પુરાવા સાથે ખંડન કરવામાં આવે, અને કરારો અને નાણાકીય વ્યવહારોને સંપૂર્ણ રીતે ધ્યાનમાં લેવા જોઈએ.

Acts Referred:
Code of Criminal Procedure, 1973 Sec. 378
Negotiable Instruments Act, 1881 Sec. 139, Sec. 138

Counsel:
Ashish M Dagli, N K Majmudar, C M Shah

JUDGEMENT

S V Pinto, J.- [1] At the outset, learned advocate for the applicant seeks permission to delete the name of **Respondent No. 5 i.e. Patel Harishbhai Laxmibhaidas** as also submits that by an order dated 10/07/223 passed by this Court, matter qua **Respondent No. 6 i.e. Patel Rajnikant Hiralal** is abated since the respondent No. 6 has expired.

Permission as prayed for is granted. Registry is directed to delete the name of **Respondent No. 5 Patel Harishbhai Laxmibhaidas** and necessary amendment shall be carried out.

1. The present application has been filed by the original complainant seeking leave to appeal under Section 378(4) of the Code of Criminal Procedure, 1973 (hereinafter referred to "Cr.P.C.", for short) challenging the judgement and order of acquittal dated **17/03/2023** passed by the **learned Judicial Magistrate First Class,**

Dakor (hereinafter referred to as the learned trial Court) in **Criminal Case No. 85 of 2002**, whereby the learned trial Court was pleased to acquit the Respondent Nos. 2, 3, 4 and 7 for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (herein after referred to as the "N.I Act", for short).

[2] Heard learned advocate Mr. Ashish Dagli for the applicant, learned Additional Public Prosecutor Ms. C.M.Shah for the respondent No. 1- State, learned advocate Ms. Raksha Dixit for the respondent No. 2 and learned advocate Mr. N.K. Majmudar for the respondent Nos. 3, 4 and 7. Perused the impugned judgement and order to examine whether the applicant has an arguable case to grant leave to appeal and admit the appeal.

[3] The brief facts culled out from the impugned judgement and order and the submissions of the learned advocates as also the petition are as under:-

3.1 The respondent No. 2 is CURE AIM PHARMACEUTICAL, a partnership firm and the respondent Nos. 3, 4 and 7 are the partners of CURE AIM PHARMACEUTICAL Firm. As per the complaint, the present applicant and the Respondent Nos. 3, 4 and 7 had friendly relations and the Respondent No. 2-Firm was in need of some finance, which was given by the applicant and the applicant was added as a partner to the said Firm on 01/08/1998. The management of the said Firm was done by the Respondent Nos. 3, 4 and 7 and a dispute arose between them and a legal enforceable debt of Rs. 35,50,000/- till 31/05/1999 was outstanding to be paid to the applicant. An agreement on a stamp paper of Rs. 50/- was executed between them on 30/09/1999 but as the parties did not act as per the terms of the settlement, an Arbitration Petition - I.A.AP. No. 49 of 2000 was filed before this Court and an Arbitrator was appointed by an order dated 08/12/2000. The applicant also filed Arbitration Application No. 94 of 2000 before the Civil Court, Nadiad and an order of status quo was granted in favour of the applicant. The settlement proceedings were carried on and on 19/01/2001, a legally enforceable debt of Rs. 49,75,000/- was found to be outstanding to be paid to the applicant and a Memorandum of Understanding was executed in the presence of the Arbitrator and the advocates. The respondent No. 4 accepted the responsibility on behalf of the respondent No. 2 Firm and all the other respondents and 25 cheques of The Dakor Nagrik Sahkari Bank Ltd., Dakor Branch were issued in favour of the applicant. A **Cheque No "279501" of Rs. 1,50,000/-** dated **01/11/2001** was deposited by the applicant in his bank i.e. The Dakor Nagrik Sahkari Bank Ltd., Dakor Branch on **03/12/2001**, and the cheque was returned with the endorsement **"insufficient funds".** The applicant gave the statutory notice dated **15/12/2001** through his advocate by RPAD/ UPC, but the amount was not paid within the stipulated time period and hence the applicant filed the complaint under Section 138 of the N.I. Act before the learned trial court which was registered as **Criminal Case No 85 of 2002** . The respondent Nos. 2,3,4 and 7 appeared before

the learned trial Court and at the conclusion of the trial the learned trial Court was pleased to acquit the respondent Nos. 2,3,4, and 7 from the offence.

[4] Learned advocate Mr. Ashish Dagli for the applicant has submitted that the applicant has produced all the oral and document evidences but the learned trial Court has not considered that the applicant had a legally enforceable debt and all the ingredients of Section 138 of the N.I.Act were fulfilled and satisfied and the presumption under Section 139 of the N.I. Act is to be drawn in favour of the applicant and the same has not been believed. The agreements have been produced and all the transactions in question have been proved by documentary evidence, but the learned trial Court has observed that the cheque was given as a security without any cogent evidence produced by the respondent Nos. 2, 3,4 and 7. The impugned judgement and order is illegal and perverse and interference is required, and the leave to appeal is required to be granted.

[5] Learned advocate Mr. N.K.Majmudar has submitted that the learned trial Court has considered all the aspects and no interference is required in the impugned judgement and order and leave to appeal is not required to be granted.

[6] Considering the submissions of the learned advocates and on perusal of the impugned judgement and order, it prima facie, transpires that the applicant has stepped into the witness box and the deposed at **Exh:111** and the **Cheque No."279501"** is produced at **Exh:P131/ P.W.1**, the return memo is produced at **Exh:P132/P.W.1**, the statutory notice given to the respondents is produced at **Exh:P134/P.W.1** and the RPAD slips and UPC slips have also been produced. The agreements executed between the parties are also produced in the evidence of the applicant. The respondents have produced the balance sheet of the respondent No. 2- Firm.

[7] At this juncture, it would be fit to refer to Section 139 of the N.I. Act which reads as under:-

139. Presumption in favour of holder.-

> "It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

[8] In cases filed under Section 138 of the N.I.Act, the initial presumption is required to be drawn in favour of the complainant and it is settled position of law that presumption cannot be rebutted unless the contrary is proved by the accused. The rebuttal of presumption can be drawn from the evidence available on record and the accused may lead evidence or himself step into the witness box to put up his case. Considering the disputes involved between the parties and the arbitration proceedings, pursuant to which agreements have been executed between the parties, in the presence of the arbitrator and the advocates prima facie, it appears that there were financial transactions between the applicant and the respondent No. 2-Firm and disputes had

arisen about these financial transaction and efforts were made to settle the financial transactions through arbitration proceedings and the Memorandum Of Agreement was executed in the presence of the Arbitrator and the advocates of the parties. The learned trial Court has not appreciated the Memorandum Of Agreement executed between the parties on 19/01/2001 in the correct perspective and the present leave to appeal deserves to be allowed and accordingly is allowed

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2024(2)GDCJ538

IN THE HIGH COURT AT CALCUTTA

[Before Ajoy Kumar Mukherjee]

Cr R (Criminal Revision) No 3398 of 2022 **dated 10/09/2024**

Subhash Kedia

Versus

State of West Bengal

COMPANY NOT ACCUSED

Code of Criminal Procedure, 1973 Sec. 482, Sec. 203, Sec. 401 - Negotiable Instruments Act, 1881 Sec. 141, Sec. 138 - Company Not Accused - Petitioner sought to set aside orders of lower courts which dismissed a complaint under Section 138 of Negotiable Instruments Act due to non-impleading of the company as an accused - Complaint alleged petitioner issued cheques on behalf of company which were dishonoured - Trial court dismissed the complaint stating Section 141 requires the company to be made an accused for maintaining such complaints - Revisional court set aside the order, stating the director can be vicariously liable even without the company being an accused - Petitioner contended no demand notice was served on company, making proceedings invalid - Held that absence of the company as an accused and lack of demand notice rendered the proceedings defective - Proceedings quashed. - Petition Allowed

Law Point: Section 141 of the Negotiable Instruments Act mandates that a company must be made an accused for prosecution of its directors. Failure to serve demand notice on the company makes proceedings invalid.

ફોજદારી કાર્યરીતિ સંહિતા, 1973 કલમ 482, કલમ 203, કલમ 401 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 કલમ 141, કલમ 138 - કંપની આરોપી નહીં - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટની કલમ 138 હેઠળની ફરિયાદ માં કંપની ને આરોપી તરીકે રજૂ ન કરવાને કારણે ફગાવી દીધી હતી અરજદારે નીચલી અદાલતોના આદેશોને બાજુએ રાખવાની માંગ કરી હતી - ફરિયાદમાં આરોપ મૂકવામાં આવ્યો છે કે અરજદારે કંપની

વતી ચેક જારી કર્યા હતા જે ચેક વણ ચૂકવાયેલ પરત ફરેલ - ટ્રાયલ કોર્ટે ફરિયાદને ફગાવી દીધી હતી અને કહ્યું હતું કે કલમ 141 માં કંપનીને આવી ફરિયાદો જાળવવા માટે આરોપી બનાવવાની જરૂર છે - રિવિઝનલ કોર્ટે આ આદેશને રદબાતલ ઠરાવ્યો હતો અને જણાવ્યું હતું કે, કંપની આરોપી હોય તે સિવાય પણ ડિરેક્ટર જવાબદાર હોઈ શકે છે. - અરજદારે દલીલ કરી હતી કે કંપની પર કોઈ ડિમાન્ડ નોટિસ આપવામાં આવી નથી, કાર્યવાહીને અમાન્ય બનાવે છે - એવું ઠરાવવામાં આવ્યું હતું કે આરોપી તરીકે કંપનીની ગેરહાજરી અને ડિમાન્ડ નોટિસના અભાવને કારણે કાર્યવાહી ખામીયુક્ત બની છે - કાર્યવાહી રદ્દ કરવામાં આવી - અરજી મંજૂર

કાયદાનો મુદ્દો: નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ્સ એક્ટની કલમ 141 આદેશ આપે છે કે કંપનીને તેના ડિરેક્ટર્સ સામે કાર્યવાહી કરવા માટે આરોપી બનાવવી આવશ્યક છે. કંપનીને ડિમાન્ડ નોટિસ આપવામાં નિષ્ફળતા કાર્યવાહીને અમાન્ય બનાવે છે.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 482, Sec. 203, Sec. 401
Negotiable Instruments Act, 1881 Sec. 141, Sec. 138

Counsel:

Pratim Priya Das Gupta, Aasish Choudhary Meera Agarwal, Ritzu Ghosal, Chandan Banerjee, Abhra Jena, Anirban Ghosh

JUDGEMENT

Ajoy Kumar Mukherjee, J.- [1] This an application wherein petitioner has prayed for setting aside order dated 25thJuly 2022 passed by learned Additional Session Judge, 1st track court, Durgapur in Criminal Revision no. 17 of 2021, whereby the court below had affirmed the order passed by learned judicial Magistrate 3rd court Durgapur, in C.R case no. 258 of 2020.

[2] The brief background in the present case is that a complaint proceeding being aforesaid C.R case no. 258 of 2020 was initiated by opposite party no. 2 herein under section 138 of the Negotiable Instrument Act, 1881 (in short N.I Act), with the allegations that as per work order being no. ETPTUL/OE/18-19/01 dated 9th may 2018 as offered by the petitioner herein for execution and erection of 33 KV DVC transmission line, the opposite party no. 2 herein completed the assigned work and raised a bill amounting to Rs. 1,02,75,792/- and for which six post dated cheques were issued. Further allegation made by opposite party 2 is that the opposite party no.2 presented the said cheques with its banker wherein all the cheques returned unpaid

with the remark "payments stopped". Thereafter opposite party no. 2 sent demand notice but despite receipt of notice, the petitioner did not pay the dishonoured cheque amount within 15 days and for which the aforesaid impugned proceeding was initiated by oppositeparty no. 2 herein.

[3] The filing court took cognizance upon the alleged offence and thereafter transferred the same to Judicial Magistrate 3rd court, Durgapur, for inquiry. The transferee court after examining opposite party no 2 was pleased to dismiss the said complaint under section 203 of the Code of Criminal Procedure with the observation that the expression "as well as the company" used in section 141 of the N.I Act implies that if the company has not been made an accused, then such complaint would not be maintainable. In other words statutory prescription under the said provision is mandatory in nature.

[4] Being aggrieved by the said order the complainant preferred a Revisional Application before Additional Session Judge being aforesaid Criminal Revision no. 17 of 2021 and the Revisional Court vide impugned order dated 25th July 2022, set aside the order dated 26th March 2021 passed by the Trial Court and directed the Trial Court to dispose of the matter denovo with the observation that Director can be held vicariously liable for a company's criminal offence, if there are specific averment to that effect made in the petition of complaint and secondly technicality should not be relied upon for the purpose of defeating legitimate claim of the citizen.

[5] Being aggrieved by and dissatisfied with the said observation of the court below accused person has preferred the present Application contending that the order impugned has been passed without adhering to the law as laid down by the Apex Court and also the statutory provision. It is further argued that on bare perusal of the order impugned, it is evident that the petitioner herein was not made a party to the said proceeding and no opportunity of hearing was afforded to the petitioner. Referring section 401(2) of the code he submits that no order under that section shall be made to the prejudice of the accused or other person, unless he had an opportunity of being heard.

[6] It is further argued that from the complaint it is evident that there is no specific averment as to the fact that the petitioners are in charge of or responsible for day to day business. In catena of decisions it has been settled that in order to make a Director liable for commission of offence under section 138 of the N.I Act, it is mandatory that the complaint must reflect specific averment that said Director was in charge of and was responsible to the company for the conduct of its business and in absence of such averment, the proceeding is liable to be quashed

[7] The next limb of argument advanced on behalf of petitioner is that where the offence under section 138 of N.I Act has been committed by a company, the company must be made an accused in order to continue the proceeding and unless the company has been made an accused, the Director of said company cannot be prosecuted even if

said Director was in charge of company at the time of the offence. Therefore making the company as an accused in the petition of complain is a sine quo non to prosecute a director of said company and learned Court below wrongly observed that it was merely procedural defect. Accordingly the petitioner prayed for setting aside the order impugned Petitioners in this context relied upon following judgments

(a) **Siby Thomas Vs. Somany Ceramics Limited**, 2024 1 SCC 348

(b) **Himanshu Vs. B. Shivamurthy & Anr**, 2019 3 SCC 797

(c) **AneetaHada Vs. Godfather Travels & Tours (p) Ltd.**, 2012 5 SCC 661.

(d) Manish Kumar Gupta Vs. Mittal Trading Company,2024 SCCOnlineSc 1732.

(e) HarikisanVithaldasjiChandak& Ors Vs. Syed Mazaruddin Syed Sghabuddin& Ors,2023 SCCOnlineBOM 955.

[8] Mr. Ritju Ghosal learned counsel appearing on behalf of the opposite party submits that in the instant application petitioner has intentionally prevented himself from annexing the agreement between the parties which is the inception and primary document corroborating the liability of petitioner, who is the signatory of the said agreement. In the said agreement it was undertaken that all the six post-dated cheques as stated in the agreement are genuine and would be encashed only after confirmation from Director of Easter Track Udyog, through WhatsApp message or SMS. All the six cheques got bounced even after successful start of DVC connection. Thus the liability of petitioner cannot be waved. Furthermore the work in terms of work order had already been concluded and the work order dated 09.05.2018 contains the signature of the petitioner which established the fact that the petitioner herein being the Director of the accused/company was involved in day to day business of the accused company. Furthermore on perusal of letter dated 3rd September 2019, it can be seen that the petitioner herein has addressed the said letter to Deputy Chief Engineer, DVC intimating about the completion of the transmission line and terminal equipment of the accused company done, by the complainant company herein.

[9] Mr. Ghoshal accordingly submits that on the anvil of the abovementioned circumstances, it is evident that the ground taken by the petitioner at the instant application stating that the complain does not have any averment against the petitioner or that he was not in charge of and was not responsible to the company for the conduct of the business is absolutely baseless and frivolous.

[10] He further submits that in regard to the dishonoured cheque the petitioner herein was served with a demand notice under section 138 of the N.I Act, and it was served in the office of the accused/company and for nonpayment of the cheque amount, the present proceeding has been initiated. The Director of the company and the sole company conductor of the business company was made party in the instant case as the liability solely falls upon of the petitioner herein. The accused company was not made a party in the instant complaint due to mere clerical error but that does

not take away the vicarious liability of the Director herein and the same was appreciated by the Court below in the impugned order, which is also well reasoned and it is established procedure that the exercise of court's power cannot be defeated by technical conciliation of form and procedure. Present application has been filed only to cause prejudice to the petitioner.

[11] Mr. Ghosal further submits that though the accused company has not been made an accused in the complaint but such defect is a curable defect and he seeks liberty form this court for impleading company/accused in the complaint by way of suitable amendment in the cause title of the complaint. Accordingly Mr. Ghosal concluded by saying that the order impugned does not suffer from any illegality or impropriety and as such it does not call for interference by this court. In support of his argument Mr. Ghosal relied upon following judgment:-

a) Appaji Krishnaji Kulkarni Vs. Bhimappa Tippanna Paramagouda and others,1958 SCCOnLineKar 157

b) **Rajeshbhai Muljibhai Patel and others Vs. State of Gujarat and Another**, 2020 3 SCC 794.

c) **Abraham Memorial Educational Trust Vs. C. Suresh Babu**, 2012 5 CTC 203.

[12] I have considered submissions made by both the parties.

[13] In the present context, on bare perusal of the complaint it appears that complainant in paragraph 4 has clearly admitted that the accused/company above named had issued six post-dated cheques for payment with date of presentation to the complainant Banker. It is not in dispute in the present context that no demand notice in compliance with section 138 of N.I Act was given to the accused/company.

[14] According to section 141 of the N.I. Act when the drawer of the cheque is a company every person in charge of company over and above the company is also responsible for the offence and such person and company are deemed to be liable to be proceeded against and punished unless it is proved that the offence was committed without such persons knowledge or that such person exercised all due diligence to prevent the commission of such offence.

[15] The law laid down in **Aneeta Hada's case (supra)** may be extracted below. In paragraph 58 and 59 it was held.

> "58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be

> oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted."
>
> "59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in **C.V. Parekh**, 1970 3 SCC 491: 1971 SCC (Cri) 97] which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal [(1984) 4 SCC 352: 1984 SCC (Cri) 620] does not correctly lay down the law and, accordingly, is hereby The decision in **Anil Hada**, 2000 1 SCC 1: 2001 SCC (Cri) 174] is overruled with the qualifier as stated in para 51. The decision in **Modi Distillery**, 1987 3 SCC 684: 1987 SCC (Cri) 632] has to be treated to be restricted to its own facts as has been explained by us hereinabove."

[16] The decision of **Aneeta Hada (supra)** has been considered by the Supreme court in Himangshu Vs. B. Shivamurthy and another,2012 3 SCC 797 and it was held as follows:-

> "11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused."
>
> "12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished."
>
> "13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused."

[17] In Pawan Kumar Goel Vs. State of U.P,in Criminal Appeal No. 1999 of 2022 (decided on 17.11.2022) the court held if the complainant fails to make specific

averments against the company in the complaint for commission of an offence under section 138 of N.I Act, the same cannot be rectified by taking recourse to general principles of criminal jurisprudence. It is held that since the provisions of section 141 of N.I Act imposes vicarious liability by deeming fiction which pre-suppose and require the commission of the offence by the company, therefore unless the company has committed the offence as a principal accused, the petitioners herein would not be liable to be convicted on the basis of principles of vicarious liability.

[18] There is no quarrel with the proposition of law that while exercising inherent jurisdiction under section 482 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the acquisitions. Accordingly though it is not proper for High court at this stage to conduct a roving enquiry in respect of merit of the acquisition, but if on the face of the document which is beyond suspicion or doubt it appears that the accusation cannot stand, in order to prevent justice or abuse of process, it is incumbent upon the High court to look into those issues which have a bearing on the matter even at the initial stage.

[19] In the present case it is not in dispute that the demand notice which were supposed to be given to the accused/company within thirty days from the date of receipt of information by the complainant from the bank, has not been given and the demand notice was only given to the petitioner herein though the cheques were admittedly issued by accused/company. It is one of the basic requirements as laid down in proviso to section 138 of the N.I. Act. for successful prosecution is that a notice in writing is to be given to the drawer of the cheque i.e. the accused/company within thirty days from the date of receipt of the information. In the present case no notice was given to the company and the company was not sought to be made an accused. Since the complaint on the very face of it discloses that the cheques were issued by the said company through its authorized signatory no process could have been issued against the present petitioner, only because he had signed on behalf of the said company as its authorized signatory.

[20] The other question therefore, automatically comes is whether the defect of not impleading the company as an accused in the complaint is a curable defect which can be cured by way of making amendment in the complaint or not. Law in this context is no more res integra. In **Himangshu Vs. B. Shibamurthy & another**, 2019 3 SCC 797 the Apex Court clearly held that in the absence in the company being arraigned as an accused a complaint against the appellant is not maintainable. This is mainly because in the absence of a notice of demand being served on the company and without compliance with the proviso to section 138, the company cannot be subsequently arraigned as an accused by way of amendment. In the said judgment Supreme Court also considered the judgment of **Aneeta Hada's Case (supra)**.

[21] A co-ordinate Bench of this court in a subsequent judgment in Paresh Manna Vs. The State of West Bengal,2024 SCConlinecal 2748 was pleased to set aside conviction order passed by the Trial Court for non-compliance of section 141 of the N.I. Act. In the said case also the cheque was issued by the accused/petitioner as a director of company and not under his personal capacity but the notice under section 138 of N.I. was issued only to the petitioner.

[22] In view of aforesaid settled proposition of law and also in view of the fact that the petitioner had issued the cheque as authorized signatory of the company, the present proceeding under section 138 is not maintainable as the company has not be arrayed as an accused in the complaint and also because such defect is incurable in nature since no demand notice was served upon the company within thirty days from the date of receipt of information from bank about return of the cheque, in compliance with section 138 of the N.I. Act.

[23] In such view of the matter **CRR 3398 of 2022** is allowed. The impugned proceeding being C.R. Case no. 258 of 2020 presently pending before learned Judicial Magistrate, 3rd Court, Durgapur is hereby quashed. Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities

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2024(2)GDCJ545

IN THE HIGH COURT OF JAMMU AND KASHMIR

[Before Rajnesh Oswal]

Cr M C No 276 of 2018 **dated 06/09/2024**

Sheikh Owais Tariq

Versus

Satvir Singh S/o Joginder Singh

FROZEN ACCOUNT CHEQUE

Negotiable Instruments Act, 1881 Sec. 138 - Frozen Account Cheque - Petitioner filed a complaint under Section 138 of the Negotiable Instruments Act after the respondent's cheque was dishonoured due to a frozen account - Trial court issued process, but respondent argued that cheque dishonour due to frozen account does not attract liability under Section 138 - Revisional court quashed the complaint - Court held that Section 138 is applicable even for cheques dishonoured due to frozen accounts if the cheque was issued to discharge a liability - Revisional court's order quashed case remanded for trial. - Petition Allowed

Law Point: Cheques dishonoured due to a frozen account may still attract liability under Section 138 of the Negotiable Instruments Act, as long as the cheque was issued to discharge a debt or liability.

નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 સે.138 - ફ્રોઝન એકાઉન્ટ ચેક - અરજદારે નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટની કલમ 138 હેઠળ ફરિયાદ દાખલ કરી હતી કારણ કે ફ્રીઝ થયેલા ખાતા ને કારણે પ્રતિવાદીના ચેક વણચૂકવાયેલ પરત ફરેલ - ટ્રાયલ કોર્ટે પ્રક્રિયા પ્રસ્સિદ્ધ કરી હતી, પરંતુ પ્રતિવાદીએ દલીલ કરી હતી કે સ્થિર ખાતાને કારણે ચેક અપમાન કલમ 138 હેઠળ જવાબદારીને આકર્ષિત કરતું નથી - રિવિઝનલ કોર્ટે ફરિયાદ રદ્દ કરી - કોર્ટે ઠરાવ્યું હતું કે જો જવાબદારી નિભાવવા માટે ચેક આપવામાં આવ્યો હોય તો ફ્રીઝ એકાઉન્ટ્સના કારણે ચેક વણ ચૂકવાયેલ પરત ફરે તો તે માટે પણ કલમ 138 લાગુ પડે છે - રિવિઝનલ કોર્ટના આદેશથી ટ્રાયલ માટે રિમાન્ડ પર રખાયેલા કેસને રદ્દ કરવામાં આવ્યો હતો. - અરજી મંજૂર

કાયદાનો મુદ્દો: સ્થિર ખાતાને કારણે અનાદર થયેલ ચેક હજુ પણ નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટની કલમ 138 હેઠળ જવાબદારીને આકર્ષી શકે છે જ્યાં સુધી ચેક દેવું અથવા જવાબદારીને ડિસ્ચાર્જ કરવા માટે જારી કરવામાં આવ્યો હોય.

Acts Referred:
Negotiable Instruments Act, 1881 Sec. 138

Counsel:
Zahoor A Shah, Ishfaq Bashir

JUDGEMENT

Rajnesh Oswal, J.- [1] The petitioner had filed a complaint under section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act') against the respondent, as the cheque claimed to have been issued by the respondent was dishonoured due to the reason 'Account Frozen'.

[2] The learned court of 3rd Additional Munsiff (JMIC), Srinagar (hereinafter to be referred as 'the Trial Court') vide order dated 23.08.2014 issued the process against the respondent for commission of offence under section 138 of the Act. The respondent filed an application before the learned Trial Court stating therein that as the cheque in question has been dishonoured due to the frozen account, the complaint under section 138 of the Act was not maintainable. The learned Trial Court after hearing the parties, dismissed the said application vide order dated 04.11.2017. The respondent being aggrieved of orders dated 23.08.2014 (order of issuance of process) and 04.11.2017 passed by the learned Trial Court, filed a revision petition thereby impugning both the orders mentioned above before the court of learned Principal Sessions Judge, Srinagar (hereinafter to be referred as 'the Revisional Court'). The

learned Revisional Court vide its order dated 09.05.2018 quashed both the abovementioned orders, resulting into dismissal of the complaint.

[3] Aggrieved of order dated 09.05.2018 passed by the Revisional Court, the petitioner has sought the quashing of the same on the following grounds:

(i) That the learned Magistrate had rightly dismissed the application for dropping of the proceedings, as no provision for dropping of proceedings was available in the Code of Criminal Procedure.

(ii) That the Revisional Court has not considered this aspect of the matter that even the complaints for dishonour of cheques on account of 'Closed Account' or 'Payment Stopped by the Drawer' are maintainable and likewise a complaint can be filed, even in case of dishonour of cheque due to frozen account.

[4] The objections to the petition have been filed by the respondent wherein it has been stated that the petitioner has concealed the material facts before this Court as on the presentation of the cheque by the petitioner, the account of the respondent was frozen by the Investigating Agencies and despite having the funds available in the account, the cheque issued was not honoured as the situation was beyond the control of the respondent. The stand of the respondent is that the situation was beyond his control as such, the respondent could not have been proceeded against for commission of offence under section 138 of the Act, as the cheque was dishonoured only because of the account was frozen pursuant to the order of the Crime Branch.

[5] Learned counsel for the petitioner has vehemently argued that the learned Revisional Court was not right in returning a finding that the application for dropping of proceedings was wrongly decided by the learned Trial Court, as the learned trial court had no power to review its own order, once the cognizance had already been taken and process issued against the accused/respondent. He has further argued that the learned Revisional Court has wrongly returned a finding that it was not the case of the petitioner that besides the frozen account, there were insufficient funds in the account of the respondent to make him liable for prosecution under section 138 of the Act, as the said finding, if at all was to be returned, could have been returned only after the trial and not at the threshold when only the process was issued against the respondent. He has further argued that there was nothing on record to show as to when the account was frozen because the cheque was issued on 01.07.2014 and the same was dishonoured vide memo dated 14.07.2014.

[6] Learned counsel for the respondent has submitted that the cheque was dishonoured not because of the insufficient funds but because the bank account of the respondent was frozen by the Crime Branch and it was not because of the fault of the respondent that the cheque was dishonoured. He has placed reliance upon the judgments of the High Court of Bambay in **Mr. Kishore Shankar Singapurkar vs State of Maharashtra and Mafatlal**, High Court of Delhi in Vijay Choudhary vs

Gyan Chand Jain,2008 2 Bankmann 274 and High Court of Delhi in **M/s Ceasefire Industries Ltd v State and others.**

[7] Heard and perused the record.

[8] A perusal of the record of the trial court reveals that the complainant filed the complaint by alleging that the respondent owed an amount of Rs. 8,69,700/- and to discharge the said liability, he issued the cheque dated 01.07.2014 in favour of the petitioner which was drawn on Axis Bank Limited. The petitioner presented the said cheque for encashment with his bank but the same was dishonoured by the banker of the respondent vide memo dated 14.07.2014 with the endorsement 'Account Frozen'. The notice was issued to the respondent which the petitioner claims, was received by the respondent and as the respondent did not make the payment within the stipulated period, he filed the complaint under section 138 of the Act against the respondent.

[9] The record further depicts that after recording the statement of the petitioner and one witness, the learned Trial Court issued the process against the respondent for commission of offence under section 138 of the Act vide order dated 23.08.2014. The respondent thereafter filed an application before the learned trial court for dropping of the proceedings only on the ground that the complaint for dishonour of cheque due to frozen account, does not fall within the ambit of the Act.

[10] The petitioner responded to the said application by submitting that the learned Magistrate has no power to drop the proceedings and further that the respondent in order to cheat the petitioner issued the cheque despite the fact that there were no funds lying in the account of the accused either at the time of the issuance of the cheque or on the day the cheque was presented. It was also alleged that the respondent on his own got the account frozen in order to obtain huge gain for himself and cause wrongful loss to the petitioner. The learned trial court dismissed the said application by virtue of order dated 04.11.2017 observing that as the court had already taken a cognizance, the application for dropping of proceedings was not maintainable. The respondent assailed the order dated 04.11.2017 and also order dated 23.08.2014 whereby the process was issued against the respondent before the Revisional Court and the learned Revisional Court vide order dated 09.05.2018 set aside order dated 23.08.2014 and order dated 04.11.2017 resulting into dismissal of the complaint.

[11] The following questions arise for consideration of this Court:

(i) Whether the learned revisional court is right in returning a finding that the learned Magistrate has wrongly dismissed the application for dropping of proceedings?

(ii) Whether the complaint for dishonour of cheque due to the reason 'account frozen' is maintainable under section 138 of the Act?

[12] Issue No: (i) Whether the learned Revisional Court is right in returning a finding that the learned Magistrate has wrongly dismissed the application for dropping of proceedings?

a. The finding returned by the learned Revisional Court that the learned trial court has wrongly dismissed the application for dropping of proceedings in the complaint filed by the petitioner, is contrary to the settled proposition of law that once the Magistrate takes the cognizance and issues the process against the accused, then the Magistrate cannot put the clock back and drop the proceedings at the behest of the accused because there is no such provision in the Code of Criminal Procedure, permitting the Magistrate to recall his order, whereby he has taken the cognizance and issued process against the accused. Reliance is placed upon the judgment of the Apex Court in **Adalat Prasad v. Rooplal Jindal**, 2004 7 SCC 338 and the relevant para is extracted as under:

15. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Code.

b. Accordingly, the observation of the learned Revisional Court is contrary to law and, as such, it is held that the Revisional Court was not right in returning the finding that the trial court had wrongly dismissed the application for dropping of the proceedings filed by the respondent herein.

[13] Issue No: (ii)

Whether the complaint for dishonour of cheque due to the reason 'account frozen' is maintainable under section 138 of the Act?

a. It is true that in terms of section 138 of the Act, the complaint for dishonour of cheque can be filed against the accused when the amount lying in the account of the accused is insufficient to honour the cheque or it exceeds the amount arranged to be paid from the account by an agreement made with that bank. Though these are the only two contingences provided by the statute for initiating the proceedings against the accused for dishonour of cheque, but there are numerous judicial pronouncements wherein it has been held that the accused can be prosecuted under section 138 of the Act for dishonour of cheques on account of account closed, payment stopped by the drawer, signature mismatch and image not found, as it would fall within the first contingency as provided under the Act. In this context it would be appropriate to take note of the judgment of the Hon'ble Apex court in **Laxmi Dyechem v. State of Gujarat**, 2012 13 SCC 375, wherein it has been held and observed as under:

9. **The question that falls for our determination is whether dishonour of a cheque would constitute an offence only in one of the two contingencies envisaged**

under Section 138 of the Act, which to the extent the same is relevant for our purposes reads as under:

> "138. Dishonour of cheque for insufficiency, etc., of funds in the account. Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:"

From the above, it is manifest that a dishonour would constitute an offence only if the cheque is retuned by the bank "unpaid" either because the amount of money standing to the credit of the drawer's account is insufficient to honour the cheque or that the amount exceeds the amount arranged to be paid from that account by an agreement with that bank. **The High Court was of the view and so was the submission made on behalf of the respondent before us that the dishonour would constitute an offence only in the two contingencies referred to in Section 138 and none else. The contention was that Section 138 being a penal provision has to be construed strictly. When so construed, the dishonour must necessarily be for one of the two reasons stipulated under Section 138 and none else. The argument no doubt sounds attractive on the first blush but does not survive closer scrutiny.** At any rate, there is nothing new or ingenious about the submission, for the same has been noticed in several cases and repelled in numerous decisions delivered by this Court over the past more than a decade. We need not burden this judgment by referring to all those pronouncements. Reference to only some of the said decisions should, in our opinion, suffice.

XX XX XX

16. **The above line of decisions leaves no room for holding that the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. We find ourselves in respectful agreement with the decision in Magma case** that the expression "amount of money is insufficient" appearing in Section 138 of the Act **is a genus and dishonour for reasons such "as account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonour of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency referred to in Section 138, so also dishonour on the ground that the "signatures do not match" or that the**

"image is not found", which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act:

16.1. This Court has in the decisions referred to above taken note of situations and contingencies arising out of deliberate acts of omission or commission on the part of the drawers of the cheques which would inevitably result in the dishonour of the cheque issued by them. **For instance, this Court has held that if after issue of the cheque the drawer closes the account it must be presumed that the amount in the account was nil hence insufficient to meet the demand of the cheque. A similar result can be brought about by the drawer changing his specimen signature given to the bank or in the case of a company by the company changing the mandate of those authorised to sign the cheques on its behalf. Such changes or alteration in the mandate may be dishonest or fraudulent and that would inevitably result in dishonour of all cheques signed by the previously authorised signatories.** There is in our view no qualitative difference between a situation where the dishonour takes place on account of the substitution by a new set of authorised signatories resulting in the dishonour of the cheques already issued and another situation in which the drawer of the cheque changes his own signatures or closes the account or issues instructions to the bank not to make the payment. So long as the change is brought about with a view to preventing the cheque being honoured the dishonour would become an offence under Section 138 subject to other conditions prescribed being satisfied.

16.2. There may indeed be situations where a mismatch between the signatories on the cheque drawn by the drawer and the specimen available with the bank may result in dishonour of the cheque even when the drawer never intended to invite such a dishonour. We are also conscious of the fact that an authorised signatory may in the ordinary course of business be replaced by a new signatory ending the earlier mandate to the bank. Dishonour on account of such changes that may occur in the course of ordinary business of a company, partnership or an individual may not constitute an offence by itself **because such a dishonour in order to qualify for prosecution under Section 138 shall have to be preceded by a statutory notice where the drawer is called upon and has the opportunity to arrange the payment of the amount covered by the cheque. It is only when the drawer despite receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount that the dishonour would be considered a dishonour constituting an offence, hence punishable.** Even in such cases, the question whether or not there was a lawfully recoverable debt or liability for discharge whereof the cheque was issued would be a matter that the trial court will examine having regard to the evidence adduced before it and keeping in view the statutory presumption that unless rebutted the cheque is presumed to have been issued for a valid consideration.

(emphasis added)

c. So far as the present case is concerned, the respondent had nowhere pleaded in his application for dropping of proceedings that he was having sufficient amount in the bank account and that he was not having the knowledge of freezing of account at the time of issuance of cheque, and in absence of any such material before the learned Revisional Court, the Revisional Court could not have put the onus upon the complainant by observing that there was no argument on the part of the respondent therein i.e. the petitioner herein that besides being the account frozen, there were insufficient funds in the account of the respondent/accused to meet his liability. The said observation is contrary to the specific pleadings made by the petitioner before the learned trial court wherein he had categorically pleaded that the respondent had fraudulently, with the aim of cheating the petitioner, issued the cheque despite the fact there were no funds lying in his account either at the time of issuance of cheque or on the day the cheque was presented. The cheque was issued on 01.07.2014 and the same was dishonoured on 14.07.2014 and in absence of any finding as to when the account was frozen i.e. whether the account was frozen prior to the issuance of the cheque or after the issuance of the cheque and further as to whether the accounts of the respondent was having sufficient amount to honour the cheque at the time of issuance of cheque or not and rightly so because there was no material before the Revisional Court to return any such finding, the petitioner herein could not have been knocked out of the court at the threshold. The learned Revisional Court has put the cart before the horse and has returned a finding which could have been returned only after the full-fledged trial. Rather, the onus would be on the respondent to prove that he was not aware about the freezing of the account when the cheque was drawn, the account was frozen due to reasons beyond his control and the account was having sufficient balance when the cheque was dishonoured.

d. In Vikram Singh vs. Shyoji Ram,2022 Legal Eagle(SC) 792, the High Court had quashed the proceedings of the complaint under section 138 of the Act, as the witnesses had stated that the accused had not opened the account with the Bank but in the memo it was mentioned that the cheque was dishonoured due to the reason 'Account Frozen'. The Hon'ble Supreme Court of India set aside the order passed by the High Court by observing that the "Account Frozen" would presuppose the existence of the account and it was premature to quash the compliant. The Hon'ble Supreme Court of India remanded the matter back for full-fledged trial.

[14] In view of above, this court is of the considered view that the complaint under section 138 of the Act is maintainable even if the cheque is dishonoured due to reason 'Account frozen'. The judgments mentioned above, cited by the learned counsel for the respondent are not applicable in the present case.

[15] Viewed thus, the present petition is allowed. Order of Revisional Court dated 09.05.2018 is set aside and the order of the trial court dated 14.11.2017 is restored.

The matter is remanded back to the trial court and the trial court shall proceed in accordance with law. The parties shall appear before the trial court on 19.09.2024.

[16] Record of court(s) below, if received in original, be returned back

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2024(2)GDCJ553

THE HIGH COURT OF JUDICATURE AT MADRAS

[Before G Jayachandran]

Crl O P (Criminal Original Petition); Crl M P (Criminal Miscellaneous Petition) No 13443 of 2024; 8148 of 2024 **dated 06/09/2024**

V Kalyan Kumar

Versus

R Venkatesan

SIGNATURE COMPARISON

Code of Criminal Procedure, 1973 Sec. 243 - Evidence Act, 1872 Sec. 45, Sec. 73 - Negotiable Instruments Act, 1881 Sec. 138 - Signature Comparison - Petitioner sought comparison of signatures on a disputed cheque in a Section 138 case under the Negotiable Instruments Act - Magistrate allowed the application but required contemporaneous documents for comparison, rejecting two of petitioner's submitted documents as unfit - Petitioner argued documents were wrongly excluded - Court set aside Magistrate's order and directed fresh consideration of petitioner's request, allowing submission of alternate documents or expert examination of original documents held by third parties - Petition allowed with directions to avoid delay. - Petition Allowed

Law Point: In cheque dishonour cases, courts may order signature comparison but should provide flexibility in accepting documents for comparison if they meet reasonable standards of contemporaneity and authenticity

ફોજદારી કાર્યરીતિ સંહિતા, 1973 કલમ 243 - પુરાવા અધિનિયમ, 1872 કલમ 45, કલમ 73 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 કલમ 138 – હસ્તાક્ષર ની તુલના - અરજદારે નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ હેઠળ કલમ 138 કેસમાં વિવાદિત ચેક પર હસ્તાક્ષરોની તુલના કરવાની માંગ કરી હતી- મેજિસ્ટ્રેટે અરજીને મંજૂરી આપી હતી પરંતુ તુલના માટે સમકાલીન દસ્તાવેજોની જરૂર હતી અરજદારના રજૂ કરેલા બે દસ્તાવેજોને અયોગ્ય ગણાવ્યા હતા - અરજદારે દલીલ કરી હતી કે દસ્તાવેજોને ખોટી રીતે બાકાત રાખવામાં આવ્યા છે - અદાલતે મેજિસ્ટ્રેટના આદેશને બાજુએ મૂકીને અરજદારની

વિનંતી પર નવેસરથી વિચારણા કરવાનો નિર્દેશ આપ્યો હતો જેમાં વૈકલ્પિક દસ્તાવેજો રજૂ કરવાની મંજૂરી આપવામાં આવી હતી અથવા ત્રાહિત પક્ષકારો દ્વારા રાખવામાં આવેલા મૂળ દસ્તાવેજોની નિષ્ણાતની તપાસ કરવાની મંજૂરી આપવામાં આવી હતી - વિલંબ ટાળવા માટેના નિર્દેશો સાથે મંજૂર કરેલ અરજી. - અરજી મંજૂર

કાયદાનો કાયદો : વણ ચૂકવાયેલા ચેકના કેસોમાં અદાલતો સહી સરખામણીનો આદેશ આપી શકે છે પરંતુ જો તેઓ સમકાલીનતા અને પ્રમાણિકતાના વાજબી ધોરણોને પૂર્ણ કરે તો સરખામણી માટે દસ્તાવેજો સ્વીકારવામાં સુગમતા પ્રદાન કરવી જોઈએ.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 243
Evidence Act, 1872 Sec. 45, Sec. 73
Negotiable Instruments Act, 1881 Sec. 138

Counsel:

Ar M Arunachalam, N Umapathi

JUDGEMENT

G Jayachandran, J.- [1] The petitioner herein is the accused in C.C.No.135 of 2021 on the file of the Judicial Magistrate, Fast Track Court, Kallakurichi.

[2] The complaint has been filed under Section 138 of N.I Act for issuing cheque for Rs.5,00,000/- dated 11.04.2021 without sufficient fund to the respondent/ complainant and the same is contested by the petitioner/accused on the ground that the signature found in the cheque is not his signature. Hence, he filed the application under Sections 45 and 73 of the Indian Evidence Act r/w Section 243 of Cr.P.C to send the disputed cheque to Expert for comparison with his admitted signature for opinion.

[3] The Learned Judicial Magistrate allowed the application in C.M.P.No.285 of 2024 on 07.03.2024 under the following conditions:

1. The petitioner / accused shall furnish three documents containing his signature and handwriting and such documents should belong to the period of April 2021 to December 2021.

2. The documents furnished by the petitioner should not 'have been created for self purpose / own use and it should be in the nature of being created for the purpose of others like a public document or documents given by the petitioner to banks or other institutions.

3. The court will decide the fitness of the documents furnished by the petitioner and in the event of the court finding any document to be unfit, the petitioner should furnish another fit document.

4. In the event of the petitioner furnishing fit documents as required above the disputed cheque and such documents will be sent for analysis to government forensic science laboratory where the expert analysis of documents would be performed.

5. The petitioner shall bear all the expenses for sending the disputed cheque for expert analysis and the petitioner shall also bear the remuneration of an advocate commissioner who will deliver all the necessary documents to the expert on behalf of the court.

6. The Advocate commissioner will be appointed after the petitioner furnishes fit documents as required above.

7. For the limited purpose of adducing evidence relating to expert opinion of the disputed cheque, the defense side evidence will be reopened.

8. The petitioner should comply with all the above conditions and requirements within a period of one month, unless there are sufficient reasons for extention, from the date of order and if the petitioner did not do so and he is found to be unnecessarily causing delay in the process of the court, this petition will be dismissed.

[4] The petitioner/accused had filed memo dated 24.04.2024 enclosing the following three documents as admitted documents for comparison.

(i). Letter dated 23.09.2020 submitted by the accused to the Commercial Department.

(ii). Cheque signed by the accused dated 01.03.2021 given to Punjab National Bank.

(iii). Sale deed dated 22.02.2021 in which the accused has signed as one of the witness.

[5] The Learned Magistrate considering the nature of the documents listed in the memo, accepted the first document and rejected the other two documents. Further, directed the accused to furnish any other two documents fit for examination. The said docket order dated 24.04.2024 is under challenge in this petition.

[6] The Learned Counsel for the petitioner contended that the Learned Judicial Magistrate erred in fixing April 2021 to December 2021 as contemporaneous period for testing the signature in the cheque dated 11.04.2021. In fact, accepted documents which are reasonable, prior to the disputed document ought to have been taken for comparison instead the Learned Judicial Magistrate sought for documents which were executed subsequent to the disputed cheque.

[7] The Learned Counsel further submitted that the Learned Magistrate while accepted the first document dated 23.09.2020 which in fact prior to March 2021, had assigned no reason for rejecting the other two document which are dated 01.03.2021 and 22.02.2021 which are nearer to April 2021.

[8] Per contra, the Learned Counsel for the respondent/complainant submitted that, the Learned Judicial Magistrate apart from fixing the period of the documents between April to December 2021, also has laid condition that the document should not be created for self purpose/own use and it should be in the nature of being created for the purpose of others like public document or document given by the petitioner to Banks or other institutions. The 2nd and 3rd documents were rejected since those two documents does not satisfy the 2nd condition.

[9] The rival contentions of the Learned Counsel for the petitioner and the Learned Counsel for the respondent heard.

[10] From the order of the Learned Judicial Magistrate passed in C.M.P.No.285 of 2024, dated 07.03.2024 and the docket order on the memo dated 24.04.2024, it could be seen that the Learned Judicial Magistrate though had fixed April 2021 to December 2021 as period contemporaneous to the cheque dated 11.04.2021. He has taken the first document for comparison though it is dated 23.09.2020 since it satisfy the 2nd condition.

[11] The other two documents one being a self serving document and other being a photocopy of the sale deed, it was rejected presumable it is not fit for comparison.

[12] The learned Counsel for the petitioner in the course of his argument prayed that, the signature of the petitioner as witness to the document No.761/2021, dated 22.02.2021 is also available in the register maintained at SRO Office Cuddalore and if the original signature has to be seen by the Expert, the Learned Magistrate shall appoint an Advocate Commissioner to collect the Register or authorise the Expert to visit the SRO Office, Cuddalore to examine the document/take photograph for the purpose of comparison. He also submitted that the 2nd document i.e., Self cheque of Punjab National Bank, dated 01.03.2021 is a document given to the Bank and honoured by the Bank, being satisfied with the signature of the account holder. Therefore the original cheque which will be in the custody of the Bank can be called for or examined by the Expert visiting the Bank with the permission of the Court. He further submitted that if the examination of the original of these two documents, for any reason not feasible, the petitioner may be permitted to produce any other documents to the satisfaction of the Learned Magistrate to prove his defence.

[13] On considering the above submission, in order to provide fair opportunity to the accused to put forth his defence, the docket order dated 24.04.2024 passed by the Learned Judicial Magistrate, Kallakurici is set aside.

[14] The memo of the petitioner filed on 24.04.2024 to be considered afresh based on the submission made by the petitioner which is extracted in paragraph No.12 and pass appropriate order in the memo.

[15] The petitioner may be permitted to produce any other alternate document which may be fit for comparison with the disputed document, if the Learned

Magistrate find all or any document mentioned in the memo is not fit for comparison. The petitioner shall in such event, shall not delay the process and should come forward to offer alternate document within 15 days, from the date of order passed in the memo. Failing which, the Learned Magistrate shall proceed to the next stage of the trial and complete the same as expeditiously as possible.

[16] Accordingly, this Criminal Original Petition is disposed of with the above direction. Consequently, connected Miscellaneous Petition is closed

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2024(2)GDCJ557

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[From AURANGABAD BENCH]

[Before Vibha Kankanwadi; S G Chapalgaonkar]

Criminal Application No 3763 of 2022 **dated 04/09/2024**

Sandip S/o Uttam Shinde; Arti W/o Sandip Shinde

Versus

State of Maharashtra; Devidas S/o Bansi Shinde

MONEY LENDING ALLEGATION

Indian Penal Code, 1860 Sec. 504, Sec. 506 - Code of Criminal Procedure, 1973 Sec. 482 - Negotiable Instruments Act, 1881 Sec. 138 - Maharashtra Money-Lending (Regulation) Act, 2014 Sec. 39 - Money Lending Allegation - Appellants sought quashing of FIR under Sec. 39 of the Money Lending Act and Sec. 504, 506 IPC alleging they engaged in money lending without a license - Respondents claimed appellants lent Rs.1,00,000 with high interest and pressured for land transfer - Court held a singular loan transaction does not constitute money lending business under Sec. 39 of the Act - FIR and criminal proceedings quashed - Application Allowed

Law Point: A singular loan transaction does not qualify as "business of money lending" under Sec. 39 of the Maharashtra Money-Lending Act - Continuous and systematic activity is required for such an offence.

ભારતીય દંડ સંહિતા, 1860 કલમ 504, કલમ 506 - કોડ ઓફ ક્રિમિનલ પ્રોસિજર, 1973 કલમ 482 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ્સ એક્ટ, 1881 કલમ 138 - મહારાષ્ટ્ર મની-લેન્ડિંગ (રેગ્યુલેશન) એક્ટ, 2014 કલમ 39 - મની લેન્ડિંગ નો આરોપ - અપીલકર્તાઓએ મની લેન્ડિંગ એક્ટની કલમ 39 અને કલમ 504, 506 આઈપીસી હેઠળ એફ.આઈ.આર. ને રદ કરવાની માંગ કરી હતી જેમાં આરોપ મૂકવામાં આવ્યો હતો કે તેઓ લાઇસન્સ વિના નાણાં ધિરાણમાં રોકાયેલા છે – પ્રતિવાદીઓએ દાવો કર્યો હતો

કે અપીલકર્તાઓએ ઊંચા વ્યાજ સાથે રૂ .1,00,000 ઉધાર આપ્યા હતા અને જમીન ટ્રાન્સફર માટે દબાણ કર્યું હતું - અદાલતે ઠરાવ્યું હતું કે એકમાત્ર લોન વ્યવહાર કાયદાની કલમ 39 હેઠળ નાણાં ધિરાણના વ્યવસાયની રચના કરતો નથી - એફ.આઈ.આર. અને ફોજદારી કાર્યવાહી રદ કરવામાં આવી છે - અરજી મંજૂર

કાયદાનો મુદ્દો: એક માત્ર લોન વ્યવહાર હેઠળ "મની ધિરાણના વ્યવસાય" મહારાષ્ટ્ર મની-લેન્ડિંગ એક્ટના કલમ 39 તરીકે લાયક નથી - આવા ગુના માટે સતત અને યોજનાપૂર્વક પ્રવૃત્તિ જરૂરી છે.

Acts Referred:
Indian Penal Code, 1860 Sec. 504, Sec. 506
Code of Criminal Procedure, 1973 Sec. 482
Negotiable Instruments Act, 1881 Sec. 138
Maharashtra Money-Lending (Regulation) Act, 2014 Sec. 39

Counsel:
S D Jayabhar, D R Jayabhar, A R Kale, A S More

JUDGEMENT

S. G. Chapalgaonkar, J.- [1] The applicants seek to quash and set aside criminal proceeding in S.C.C. No.198/2022 pending before Judicial Magistrate First Class, Jamkhed, which is arising out of Crime No.77/2022 registered with Jamkhed Police Station, Dist. Ahmednagar for offences punishable under Section 39 of the Maharashtra Money Lending (Regulation) Act, 2014 (for short 'Act of 2014') and Sections 504, 506 of the Indian Penal Code.

[2] The respondent no.2 herein lodged report dated 04.02.2022 with Police Station Jamkhed alleging that he runs sugarcane juice business at Bus Stand. In the year 2018, he was in need of money for establishment of hotel business. He had obtained loan of Rs.1,00,000/- at the interest rate of 10% per month from applicant no.1-Sandip Uttamrao Shinde. By way of security of loan a cheque of Rs.1,00,000/- was drawn on account of son of informant in the name of applicant no.1. On 01.01.2019 total amount of Rs.1,50,000/- was deposited with Mrs. Arti Sandip Shinde i.e. applicant no.2 towards repayment of loan alongwith interest. Although entire amount of loan was repaid, applicant no.1 raised dispute and pressurized informant to transfer his plot admeasuring 2887 sq. ft.. Accordingly, a notarized document was executed in his favour. On the basis of aforesaid, Crime No.77/2022 dated 04.03.2022 came to be registered against applicants with Police Station Jamkhed, Dist. Ahmednagar for offence punishable under Section 39 of the Act of 2014 as well as Sections 504, 506 of the Indian Penal Code. The investigation progressed in pursuance of aforesaid crime

and finally charge-sheet has been filed in the Court of Judicial Magistrate First Class, Jamkhed. It has been culminated in S.C.C No.198/2022.

[3] Mr. S. D. Jayabhar, learned Advocate appearing for the applicants vehemently submits that applicants have been falsely implicated in aforesaid crime. The alleged advancement of amount is of the year 2018. The alleged refund of amount is on 01.01.2019. However, present FIR is lodged on 04.03.2022. There is no plausible explanation for such inordinate delay in reporting transactions. He would submit that entire case of respondent no.2 is based on false and frivolous allegations. He would submit that applicant no.1 has instituted criminal proceeding in S.C.C. No.97/2019 against son of respondent no.2 under Section 138 of the Negotiable Instrument Act towards dishonor of cheque of Rs.1,00,000/-. Consequently, process has been issued against son of respondent no.2 vide order dated 22.02.2019. Mr. Jayabjhar would also invite attention of this Court to the notarized agreement to sale dated 08.02.2021, by which respondent no.2 has agreed to sale property bearing no.3260/7262 situated in Gut No.1080 at Jamkhed for total consideration of Rs.9,50,000/-, out of which Rs.1,00,000/- was paid by applicant no.1 towards earnest amount and Rs.8,50,000/- was balance that was to be paid at the time of execution of sale deed within a period of one year. Mr. Jayabhar would invite attention of this Court to the legal notice served upon respondent no.2 on behalf of applicant no.1, by which, respondent no.2 was called upon to execute sale deed in pursuance of agreement to sale. The said notice was duly replied by respondent no.2 admitting execution of document and transaction, further, called upon applicant no.1 to complete the transaction on or before 08.02.2022. Mr. Jayabhar would, therefore, submit that entire story in FIR in Crime No.77/2022 leading to criminal proceeding in S.C.C. No.198/2022 is false and improbable. He would, therefore, urge to quash the proceeding by invoking powers under Section 482 of the Criminal Procedure Code.

[4] Per contra, Mr. A. R. Kale, learned APP appearing for the State and Mr. A. S. More, learned Advocate for respondent no.2 vehemently opposes the prayers in the application. They would submit that applicant no.1 had advanced loan at the interest rate of 10% per month. The cheque towards security of such loan was taken which was drawn on account of son of respondent no.2. On the basis of such cheque, false criminal case has been lodged by the applicants. The respondent no.2 was forced to execute agreement to sale in pursuance of money lending business and recovery of amount and interest. They would, therefore, submit that there is sufficient material for trial of applicants for offence punishable under Section 39 of the Act of 2014.

[5] We have considered submissions advanced by learned Advocates appearing for respective parties. We have carefully considered contents of FIR and other material placed into service by parties. We observed that respondent no.2 filed report dated 04.03.2022 with Police Station Jamkhed leading to registration of Crime No.77/2022. The gist of allegation can be summarized as under:

The applicant no.1 advanced loan of Rs.1,00,000/- to respondent no.2. The interest rate of 10% per month was charged. A cheque towards security of repayment of loan amount was obtained from respondent no.2. The said cheque was drawn on the account standing in the name of son of respondent no.2. The loan amount alongwith interest i.e. Rs.1,50,000/- was deposited with applicant no.2, who is wife of applicant no.1. The applicants raised demand of additional amount towards principle and interest. The applicant no.1 has further insisted for transfer of plot owned by respondent no.2. Upon such insistence, respondent no.2 has executed notarized agreement to sale in favour of applicant no.1. Accordingly, it is alleged that applicant no.1 is dealing in money lending business and committed offence punishable under Section 39 of the Act of 2014.

[6] To test the veracity of aforesaid contents in the FIR, which according to applicants are palpably false and concocted, we have considered uncontroverted documents placed on record before us. It appears that, son of respondent no.2 namely Sudarshan Devidas Shinde has issued a cheque of Rs.1,00,000/- dated 01.01.2019 in the name of applicant no.1. On presentation, the said cheque was dishonored on 11.01.2019. The applicant no.1 issued legal notice dated 15.01.2019 raising demand of amount under dishonored cheque. On failure to make payment in terms of demand notice, the applicants instituted S.C.C. No.97/2019 in the Court of Judicial Magistrate First Class at Jamkhed against son of respondent no.2. On 22.02.2019 the process has been issued.

[7] On 08.02.2021 respondent no.2 has executed agreement to sale in favour of applicant no.1 in respect of land bearing no. 3260/7262 situated within the limits of Municipal Council Jamkhed in favour of applicant no.1. The respondent no.2 agreed to transfer plot admeasuring 55 ft. x 52 ft. in favour of applicant no.1 for consideration of Rs.9,50,000/-. The amount of Rs.1,00,000/- is paid in cash towards earnest money. The balance of Rs.8,50,000/- was to be paid within a period of one year from the date of agreement, then sale deed was to be executed. Before execution of sale deed, measurement of plot was to be carried and after leaving 30 ft. wide road on Eastern side, the actual possession was to be handed over to applicant no.1. Since transaction was not completed within stipulated period, applicant no.1 issued legal notice dated 28.01.2022 calling upon respondent no.2 to execute sale deed. The respondent no.2 replied said notice on 03.02.2022 and accepted transaction and shown his readiness to complete transaction on or before 08.02.2022.

[8] The aforesaid sequence of events would clearly reveal civil dispute subsists between parties as regards to the transfer of land. Similarly, applicant no.1 has instituted criminal proceeding for dishonor of cheque against son of respondent no.2. If the contents of reply given by respondent no.2 to the legal notice of applicant no.1 is perused, it is evident that nature of transaction to be of out-and-out sale has been clearly admitted. In this background, it is apparent that FIR in Crime No.77/2022 is

apparently improbable and patently false. The story of advancement of loan of Rs.1,00,000/- or repayment of said amount and transfer of land as a part of such loan transaction is inconsistent with the case of respondent no.2 put forth in his reply to the legal notice. Further, pendency of criminal proceeding under the provision of Negotiable Instrument Act against son of respondent no.2 is conveniently suppressed in the FIR.

[9] In the aforesaid background, if we look to the language employed in Section 39 of the Act of 2014, it is discernible that business of money lending without obtaining valid license is made punishable with imprisonment for five years with fine of Rs.50,000/-. At this stage, it would be apposite to make reference to Section 39 of the Act of 2014, which reads thus:

> "39. Whoever carries on the business of money-lending without obtaining a valid licence, shall, on conviction, be punished with imprisonment of either description for a term which may extend to five years or with fine which may extend to fifty thousand rupees or with both."

[10] This Court in case of **Mandubai Vitthoba Pawar Vs. State of Maharashtra through Superintendent of Police and Others**, 2016 1 BCR(Cri) 794 considered scope of term "business of money lending" as defined in Sub Section (3) of Section (2) of the Act of 2014 and concluded that unless there is continuous and systematic activity with a view to earning income, the existence of money lending business cannot be presumed. It is also observed that isolated transaction of money lending would not be enough to meet out requirement of term "business of money lending". In yet another judgment in case of **Anup Niranjan Dodiya and Another Vs. State of Maharashtra and Another**, 2020 AllMR(Cri) 2497 it is observed that the very foundation of offence of carrying on business of money lending is regular business activity of advancing loan to different persons and gain profit or claim some advantage for earning money.

[11] Bearing in mind aforesaid parameters of law and interpretation of term " business of money lending", if contents of FIR in present case are appreciated, the singular transaction of lending amount of Rs.1,00,000/- to respondent no.2 would not constitute business of money lending. From the FIR or other material, there is nothing to gather that applicant no.1 is continuously involved in lending money and earning profit out of such business. In absence of foundation of material to term activity of applicants as money lending business, the prosecution under Section 39 of the Act of 2014 cannot be sustained. So far as offences under Sections 504 and 506 of the Indian Penal Code are concerned, we do not find specific allegations in the FIR that would constitute such offences. In that view of the matter, we are convinced that in light of guidelines laid down by the Supreme Court of India in case of **State of Haryana and Ors. Vs. Ch. Bhajan Lal and Ors.**, 1992 AIR(SC) 604 this is a fit case to exercise

powers under Section 482 of the Criminal Procedure Code. Hence, we proceed to pass following order:

ORDER

a. Criminal Application is allowed.

b. The FIR in Crime No.77/2022 registered with Jamkhed Police Station, Dist. Ahmednagar for offences punishable under Section 39 of the Maharashtra Money Lending (Regulation) Act, 2014 and Sections 504, 506 of the Indian Penal Code and criminal proceeding in S.C.C. No.198/2022 pending before Judicial Magistrate First Class at Jamkhed, are hereby quashed and set aside.

c. Criminal Application is disposed of.

2024(2)GDCJ562

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

[From MADURAI BENCH]

[Before K Murali Shankar]

Crl R C (Criminal Revision Case); Crl M P (Criminal Miscellaneous Petition) No 814 of 2024; 8807 of 2024 **dated 02/09/2024**

Gurugovindan

Versus

Subbulakshmi

DEFENCE EVIDENCE DELAY

Code of Criminal Procedure, 1973 Sec. 315, Sec. 200 - Negotiable Instruments Act, 1881 Sec. 138 - Defence Evidence Delay - Petitioner sought to examine additional witnesses under Section 315 CrPC after already presenting one defence witness in a complaint under Section 138 of the Negotiable Instruments Act - Summons to other witnesses were returned unserved - Court observed that case had been pending since 2018 and petitioner's actions appeared to delay proceedings - Petitioner withdrew request to examine other witnesses but sought permission to examine himself - Court allowed petitioner to testify as a defence witness and directed trial court to expedite the proceedings within a stipulated time. - Petition Allowed

Law Point: A party in a case pending for a long period may be allowed to examine themselves as a witness under Section 315 CrPC even if the request to examine additional witnesses is denied, ensuring no further delay in the trial.

ફોજદારી કાર્યરીતિ સંહિતા, 1973 કલમ 315, કલમ 200 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 કલમ 138 – બચાવ ના પુરાવામાં વિલંબ - અરજદારે નેગોશિયેબલ

ઇન્સ્ટ્રુમેન્ટ એક્ટની કલમ 138 હેઠળની ફરિયાદમાં પહેલેથી જ એક બચાવ પક્ષના સાક્ષીને રજૂ કર્યા પછી કલમ 315 ફોજદારી કાર્યરીતિ સંહિતા હેઠળ વધારાના સાક્ષીઓની તપાસ કરવાની માંગ કરી હતી - અન્ય સાક્ષીઓને સમન્સ ફરી થી કરવામાં આવ્યા હતા - કોર્ટે અવલોકન કર્યું હતું કે કેસ 2018 થી પેન્ડિંગ હતો અને અરજદારનું કૃત્ય કાર્યવાહીમાં વિલંબ કરતા હોવાનું જણાયું હતું - અરજદારે અન્ય સાક્ષીઓની તપાસ કરવાની વિનંતી પાછી ખેંચી લીધી હતી પરંતુ પોતાની તપાસ કરવાની મંજૂરી માંગી હતી - અદાલતે અરજદારને બચાવ પક્ષના સાક્ષી તરીકે જુબાની આપવાની મંજૂરી આપી હતી અને ટ્રાયલ કોર્ટને નિર્ધારિત સમયની અંદર કાર્યવાહી ઝડપી બનાવવા નિર્દેશ આપ્યો હતો. - અરજી મંજૂર

કાયદાનો મુદ્દો: લાંબા ગાળા માટે પેન્ડિંગ કેસમાં પક્ષકારને કલમ 315 ક્રિમિનલ પ્રોસિજર કોડ હેઠળ પોતાને સાક્ષી તરીકે તપાસવાની મંજૂરી આપવામાં આવી શકે છે જો વધારાના સાક્ષીઓની તપાસ કરવાની વિનંતી નકારવામાં આવે તો પણ ટ્રાયલમાં વધુ વિલંબ ન થાય તેની ખાતરી કરીને.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 315, Sec. 200
Negotiable Instruments Act, 1881 Sec. 138

JUDGEMENT

K Murali Shankar, J.- [1] This Criminal Revision is directed against the order passed in Cr.M.P. (MD)No.1356 of 2024 in S.T.C.No.54 of 2023, dated 12.08.2024, on the file of the District Munsif cum Judicial Magistrate, Karambakkudi, dismissing the petition filed under Section 315(1) Cr.P.C.

[2] The respondent/plaintiff has filed a private complaint under Section 200 Cr.P.C., against the petitioner for the offence under Section 138 of the Negotiable Instruments Act and the case is pending in S.T.C.No.69 of 2023, on the file of the District Munsif cum Judicial Magistrate, Karambakudi. It is evident from the records that the respondent/plaintiff's side evidence was over and when the case was pending for defence side evidence, the present petition under Section 315(1) Cr.P.C., came to be filed.

[3] The case of the petitioner is that he has examined one Kamalakannan as defence witness and as per the evidence given by the said Kamalakannan, the petitioner has produced certain documents and the petitioner, in order to establish his defence, has to examine the persons shown in the said documents, that the petitioner

will be put to loss and hardship, if the petition is not allowed and that therefore, the petitioner has to be permitted to examine the witnesses listed in the petition.

[4] The respondent/complaint has raised objections stating that the summons were issued and on that basis, Kamalakannan was examined as defence witnesses and that though summons were sent to the other witnesses, the same were returned as un-served, that the petitioner has admitted the receipt of the amount, that the above petition for the very same reason of examining the said witnesses is legally not maintainable, that there is no bonafide in filing the petition and the same was filed only to drag on the proceedings and that therefore, the petition is liable to be dismissed.

[5] The learned Judicial Magistrate, after enquiry, has passed the impugned order dated 12.08.2024, dismissing the petition filed under Section 315(1) Cr.P.C.

[6] The petitioner in the petition filed under Section 315 Cr.P.C., has listed out the witnesses sought to be examined and in that list, he has shown 6 persons as witnesses. It is not in dispute that the petitioner has already examined Kamalakannan as defence witness. It is also not in dispute that the summons sent to the other witnesses came to be returned as "un-served". The petitioner, without considering the returning of the summons, has filed the present petition now under Section 315(1) Cr.P.C., seeking permission to examine the listed witnesses.

[7] A cursory perusal of the petition filed under Section 315 Cr.P.C., and the witnesses already examined and also the fact that the above case is pending from 2018 onwards would only go to show the intention of the petitioner to drag on the proceedings as long as possible. When the above revision was taken up for hearing today, the learned Counsel for the petitioner would submit that the petitioner may be permitted to examine himself as defence witness and he has decided not to press his relief with regard to the examination of other witnesses.

[8] Admittedly, the petitioner has not chosen to examine himself till now. Though the present petition came to be filed under Section 315 Cr.P.C., he has sought for examination of other witnesses, not the petitioner himself. Since the case is pending from 2018 onwards and that too, now in the defence stage, directing the petitioner again to approach the concerned Court under Section 315 Cr.P.C., to examine himself would only further delay the disposal of the case.

[9] Considering the above, this Court is of the view that the petitioner is to be permitted to examine himself as defence witness within the time frame to be stipulated by this Court.

[10] In the result, the trial Court is directed to examine the petitioner as defence witness and complete his examination within 15 days from the date of receipt of a copy of this order and to dispose of the case within one month thereafter.

[11] With the above directions, the Criminal Revision Case is disposed of. Consequently, the connected Miscellaneous Petition is closed

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2024(2)GDCJ565

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before Prithviraj K Chavan]

Criminal Writ Petition No. 3034 of 2022, 3035 of 2022, 3036 of 2022, 3037 of 2022, 3038 of 2022, 3039 of 2022 **dated 12/08/2024**

Hemant Mahipatray Shah and Another

Versus

Anand Upadhyay and Another; Sahil Arora and Another

TDS LIABILITY

Code of Criminal Procedure, 1973 Sec. 482 - Income Tax Act, 1961 Sec. 201, Sec. 276B, Sec. 204, Sec. 278B, Sec. 200, Sec. 221 - Negotiable Instruments Act, 1881 Sec. 141 - Essential Commodities Act, 1955 Sec. 10 - Drugs and Cosmetics Act, 1940 Sec. 34 - Income Tax Rules, 1962 Rule 30 - Finance Act, 1997 Sec. 276B - TDS Liability - Petitioners questioned legality of prosecution initiated by respondent based on delayed TDS deposits - Invoked inherent jurisdiction under Sec. 482 Cr. P.C to quash process issued by Magistrate - Complaint filed under Sec. 279(1) of Income Tax Act accused petitioners of defaulting on timely TDS deposit, making them liable under Sec. 276B r/w Sec. 278B of IT Act - Petitioners contended they were not "Principal Officers" and no notice under Sec. 2(35)(b) was issued - Argued TDS with interest already paid - Court observed no order passed declaring petitioners as "Principal Officers" - Concluded delayed TDS deposit without failure doesn't attract criminal liability under amended Sec. 276B - Process and revision orders quashed. - Petitions Allowed

Law Point: Mere delay in TDS deposit does not attract criminal prosecution under Sec. 276B if TDS along with interest has been paid, and petitioners were not treated as "Principal Officers" under the Income Tax Act.

ફોજદારી કાર્યરીતિ સંહિતા, 1973 કલમ 482 - આવકવેરા અધિનિયમ, 1961 કલમ 201, કલમ 276બી, કલમ 204, કલમ 278બી, કલમ 200, કલમ 221 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 કલમ, 141 - આવશ્યક ચીજવસ્તુઓ અધિનિયમ, 1955 કલમ 10 - ડ્રગ્સ એન્ડ કોસ્મેટિક્સ એક્ટ, 1940 કલમ 34 - આવકવેરા નિયમો, 1962 નિયમ 30 - ફાઇનાન્સ એક્ટ, 1997 કલમ 276બી - ટીડીએસ જવાબદારી - અરજદારોએ વિલંબિત

ટીડીએસ થાપણોના આધારે પ્રતિવાદી દ્વારા શરૂ કરવામાં આવેલી કાર્યવાહીની કાયદેસરતા પર સવાલ ઉઠાવ્યા હતા - મેજિસ્ટ્રેટ દ્વારા પ્રસ્સિદ્ધ કરવામાં આવેલી પ્રક્રિયાને રદ્દ કરવા માટે કલમ 482 સી.આર. પી.સી. હેઠળ અંતર્ગત અધિકારક્ષેત્રનો ઉપયોગ કરવામાં આવ્યો હતો - આવકવેરા કાયદાની કલમ 279(1) હેઠળ નોંધાયેલી ફરિયાદમાં અરજદારો પર સમયસર ટીડીએસ ડિપોઝિટમાં ડિફોલ્ટ થવાનો આરોપ મૂકવામાં આવ્યો હતો જેથી તેઓ આઇટી એક્ટની કલમ 276 બી આર/ડબલ્યુ સેક્શન 278 બી હેઠળ જવાબદાર ઠર્યા હતા - અરજદારોએ દલીલ કરી હતી કે તેઓ "મુખ્ય અધિકારીઓ" નથી અને કલમ 2 (35)(બી) હેઠળ કોઈ નોટિસ પ્રસિદ્ધ કરવામાં આવી નથી - દલીલ કરાયેલ કે પહેલેથી જ વ્યાજ સાથે ટીડીએસ ચૂકવેલ - અદાલતે અવલોકન કર્યું હતું કે અરજદારોને "મુખ્ય અધિકારીઓ" તરીકે જાહેર કરતા કોઈ આદેશ પસાર કરવામાં આવ્યો નથી - નિષ્ફળતા વિના વિલંબિત ટીડીએસ ડિપોઝિટ સુધારેલા કલમ 276 બી ફોજદારી જવાબદારીને આકર્ષિત કરતી નથી. - પ્રક્રિયા અને સુધારણા આદેશો રદ્દ કર્યા હેઠળ - અરજીઓ મંજૂર

કાયદાનો મુદ્દો: માત્ર ટીડીએસ જમા કરવામાં ના વિલંબ થી કલમ 276B હેઠળ ફોજદારી કાર્યવાહીને આકર્ષિત કરતું નથી. જો TDS સાથે વ્યાજની ચુકવણી કરવામાં આવી હોય તો અને અરજદારોને આવકવેરા કાયદા હેઠળ "મુખ્ય અધિકારીઓ" તરીકે ગણવામાં આવતા ન હોય તો .

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 482
Income Tax Act, 1961 Sec. 201, Sec. 276B, Sec. 204, Sec. 278B, Sec. 200, Sec. 221
Negotiable Instruments Act, 1881 Sec. 141
Essential Commodities Act, 1955 Sec. 10
Drugs and Cosmetics Act, 1940 Sec. 34
Income Tax Rules, 1962 Rule 30
Finance Act, 1997 Sec. 276B

Counsel:

Puneet Jain, Pawan Ved, Sajal Yadav, Aishwarya Kantawala, Diya Jayan, Meghashyam Kocharekar, Suresh Kumar, Jyoti Yadav, R S Tendulkar

JUDGEMENT

Prithviraj K Chavan, J.- [1] Rule.

[2] Rule is made returnable forthwith.

[3] Learned Counsel for the respondents waives service.

[4] With the consent of the learned Counsel for the parties, the petitions are taken up for final disposal at the stage of admission.

[5] This bunch of petitions arose from identical set of facts questioning legality and propriety of prosecution of the petitioners by the respondent No.1.

[6] The petitioners, have, therefore, invoked inherent jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 (for short "Cr. P.C") r/w Article 227 of the Constitution of India impugning issuance of process on the basis of the complaints filed by the Income Tax Officer under Section 279 (1) of the Income Tax Act, 1961 (for short "I.T Act") to prosecute them for the offence punishable under sections 276B r/w 278B of the I.T. Act. Briefly stated, facts are as follows.

[7] Respondent No.1 - Income Tax officer has filed complaints under Section 279 (1) of the I.T Act along with sanction to prosecute the petitioners for the offences as referred hereinabove. The complainants alleged that M/s. Hubtown Ltd (hereinafter referred to as "assessee") is a Company incorporated under the Companies Act, 1956. It was brought to the notice of the respondent No.1 by the assessee that it has deducted amounts of Rs. 13,11,35,617/- during the Financial Year 2011-2012 (Relevant Assessment Year 2012-13); Rs.14,54,20,798/- during the Financial Year 2013-2014 (relevant Assessment Year 2014-15), Rs.15,38,51,407/- during the Financial Year 2012-2013 (relevant Assessment Year 2013-2014), Rs.15,78,03,299/-, during the Financial Year 2016-2017 (relevant assessment year 2017-2018) , Rs. 12,70,04,846/- during the financial year 2014-2015 (Relevant Assessment Year 2015-2016) and Rs.8,78,68,793/- during the Financial Year 2017-2018 (relevant Assessment Year 2018-2019) but delayed in paying the same to the Government Treasury within the prescribed time limit.

[8] Show cause notices came to be issued to the assessee and it's Directors i.e the petitioners herein. The petitioners tendered their explanation to the respondent No.1. However, respondent No.1 arrived at a conclusion that the assessee and it's Directors are responsible for paying tax as per section 204 of the I.T Act and have, therefore, committed default under Section 200 of the I.T Act r/w Rule 30 of the Income Tax Rules without reasonable cause or to pay the tax so deducted under the various sections of the I.T Act from payment made to various parties, which amounts to an offence punishable under section 276B r/w Section 278B of the I.T Act.

[9] The CIT (TDS) accorded sanction under section 279 (1) of the I.T Act to prosecute the assessee and it's Directors under section 276B r/w 278B of the I.T. Act as, prima facie, they are liable to be prosecuted under these sections. Complaints,

therefore, came to be filed being C.C. No.529/SW/2019; C.C. No.532/SW/2019; C.C.No.530/SW/2019; C.C. No.2365/SW/2018; C.C. No.531/SW/2019 and C.C. No.27/SW/2020 in the Court of Additional Chief Metropolitan Magistrate, Mumbai.

[10] The Additional Chief Metropolitan Magistrates, Mumbai vide orders dated 16th November, 2019, 6th March, 2019, 16th November, 2019 and 25th January, 2021, prima facie, arrived at a conclusion and issued process against the petitioners and assessee, as above.

[11] The said orders were challenged by filing Criminal Revision Application No.357 of 2021, Criminal Revision Application No.360 of 2021, Criminal Revision Application No.358 of 2021, Criminal Revision Application No.361 of 2021, Criminal Revision Application No.359 of 2021 and Criminal Revision Application No.163 of 2021 before the Additional Sessions Court, Mumbai. However, the said Court also, by the impugned orders dated 2nd May, 2022 rejected the Revision Applications and confirmed the orders of issuance of process passed by the Additional Chief Metropolitan Magistrates.

[12] I heard Mr. Puneet Jain, learned Counsel for the petitioners at a considerable length as well as Mr. Suresh Kumar, learned Counsel for the respondents. I have also perused the affidavits-in-reply as well as affidavits in rejoinder.

[13] Mr. Jain in his elaborate arguments has taken me through various provisions of the I.T Act and the case laws on the subject. He would argue that the petitioners are not the principal officers and they could only be held vicariously liable provided they fulfill the statutory requirements of section 278B of the I.T Act which is more or less analogous with the provisions of section 141 of the Negotiable Instruments Act, 1881, section 34 of the Drugs and Cosmetics Act as well as section 10 of The Essential Commodities Act. He would emphasize that the complaint is bereft of essential ingredients, in the sense, the person sought to be proceeded against vicariously should be both "In-charge" and "responsible" for conducting the business of the company. No such basic averments are present in the complaint and, therefore, interference of this Court is essential.

[14] Mr. Jain would argue that just because a person is Director, it cannot be presumed that he is In-charge and responsible for the conduct of business of the company. There is no automatic presumption of vicarious liability.

[15] Mr. Jain would further argue that no order as contemplated under section 201 (1) r/w 201 (3) of the I.T Act has been passed treating any of the petitioners as "Principal Officer" of the company and by which such principal officer is whereby "deemed to be assessee in default". No notice under section 2 (35) (b) of the I.T Act has been issued by the "Assessing Officer" to any of the petitioners to treat any of them to be the "Principal Officer" of the Company. It is an admitted fact that the TDS deducted by the company has already been deposited with interest as provided under section 201 (1A) of the IT Act.

[16] Per contra, Mr. Sureshkumar, learned Counsel for the respondent No.1 while taking strong exception to the arguments of Mr. Jain would argue that in view of Section 204 of the I.T Act, the petitioners are responsible as Directors of the Company to deduct TDS. Merely because demand was made before the show cause notice would not wipe out the offence. Mr. Sureshkumar has placed reliance on a decision of the Hon'ble Supreme Court in a case of **Madhumilan Syntex Ltd and others Vs. Union of India and another**, 2007 11 SCC 297 .

[17] Mr. Sureshkumar has invited my attention to paragraph 10 of the impugned order wherein the learned Additional Sessions Judge observed that there is a specific averment in the complaint with regard to the petitioners being Directors who are responsible for paying tax as per Section 204 of the I.T Act. A show cause notice was, therefore, came to be issued to the assessee Company who thereafter sought an adjournment for ten days. The assessee, in response to the show cause notice, raised various reasons for non payment of TDS.

[18] A few undisputed facts will have to be taken into consideration before adverting to the various provisions of the I.T Act, especially, the scope of Section 276B r/w 278 of the I.T Act. It is an undisputed fact that the complaint has been filed against the Company and the petitioners who are it's Directors, for delay in deposit of TDS. Admittedly, TDS deducted by the Company had already been deposited with interest as provided under section 201(1A) of the I.T Act.

[19] No notice has been issued by the "Assessing Officer" to any of the petitioners under Section 2 (35) (b) of the I.T Act to treat any of them as "Principal Officer" of the Company.

[20] No order as contemplated under Section 201 (1) r/w Section 201 (3) of the I.T Act has been passed treating any of the petitioners as 'Principal Officer" of the company and by which such Principal Officer is whereby "deemed to be assessee in default".

[21] In respect of assessment year 2017-2018, a positive order has been passed holding the Company not to be "Assessee in Default".

[22] No order imposing penalty (either initially or further penalty) as "deemed to be an assessee in default" under Section 221 has been passed against the company or any of the petitioners.

[23] The petitioners are "Directors" of the Company, however, no averment has been made in the complaints regarding "Consent", "Connivance" or "negligence" as required under Section 278B (2) of the I.T Act.

[24] Now, the scope of section 276B (as amended by the Finance Act, 1997) will have to be understood in its correct perspective. This Section covers cases of "Failure to Pay" and not mere "Delay in Deposit" of TDS". In Pre-1997 unamended provisions, the words "as required by or under the provisions of Chapter XVII-B" could be read

along with the words "BOTH". Under the amended provisions (post 1997), the criminal liability, however, is attracted on "Failure to Pay". The phrase "as required by or under the provisions of Chapter XVII-B" is separately mentioned in Clause (a) of Section 276B and hence, is linked only with and explains the manner in which tax is required to be deducted and not the manner of payment thereof. Thus, under the amended provisions, in case TDS has been paid in full, even with some delay, Section 276B would not be attracted.

[25] At this stage, learned Counsel for the respondents places reliance on a decision of the Supreme Court in case of **Madhumilan Syntex Ltd** (supra), which, according to Mr. Sureshkumar still holds the field. However, Mr. Jain, learned Counsel for the petitioners countered that the decision in case of **Madhumilan Syntex Ltd** (supra) would not apply to the case in hand in view of a subsequent CBDT Circular issued by the respondents. According to Mr. Jain, **Madhumilan Syntex Ltd** (supra) dealt with the Assessment Year 1989-1990 (i.e prior to the 1997 Amendment) and cannot apply to the cases during the Assessment Year 2011-2012, 2012-2013, 2013- 2014, 2014-2015, 2016-2016 and 2017-2018.

[26] Mr. Jain would invite my attention to the Circular F. No. 285/90/2008 - IT (Inv-I)/05 dated 24.04.2008. Clause 3 of the said Circular reads thus;

> **""3. Identification and processing of potential prosecution cases:**
>
> 3.1 The following categories of offences shall be processed for launching prosecution:-
>
> **(i) Offences u/s 276B: Failure to pay taxes deducted at source to the credit of Central Government;**
>
> Cases, where the amount of tax deducted is Rs.25,000 or more, and the same is not deposited even within 12 months from the date of deduction, shall be processed for prosecution in addition to the recovery steps as may be necessary in such cases.
>
> The authority for processing the prosecution under this section shall be the officer having jurisdiction over TDS cases. The prosecution shall preferably be launched within 60 days of such detection. If any such default is detected during search/survey, the processing ADIT/DDIT or the authorised officer shall inform the AO having jurisdiction over TDS forthwith".

[27] In case of **Madhumilan Syntex Ltd** (supra), which was decided by the Supreme Court on 23rd March, 2007, it has been held thus;

> "In view of Section 200, 201 (Chapter XVII), 276B, 278B (Chapter XXII) and 2 (20), 31 and 35 of the I.T Act, it is clear that wherever a Company is required to deduct tax at source and to pay it to the account of the Central Government, failure on the part of the company in deducting or in paying

such amount is an offence under the Act and has been made punishable. It, therefore, cannot be said that the prosecution against a Company or its Directors in default of deducting or paying tax is not envisaged by the Act. It is held that although a Company is not a natural person but "legal" or "juristic" person that does not mean that Company is not liable to prosecution under the Act. "Corporate Criminal Liability" is not unknown to law".

[28] There can be no second view in light of the ratio laid down by the Supreme Court in case of **Madhumilan Syntex Ltd Vs. Union of India and another** (supra), at the relevant time, however, Mr. Jain has pressed into service two decisions of Punjab and Haryana High Court and of Jharkhand High Court wherein the aforesaid Circular has been referred.

[29] Let me now first look into the judgment delivered by the High Court of Jharkhand at Ranchi in case of **M/s. Dev Prabha Construction Private Limited Vs. The State of Jharkhand and another** [Cr. M.P. NO.2941 of 2018] wherein while deciding a bunch of petitions, the learned Judge has discussed scope of section 276B of the I.T Act in respect of quashing of the cognizance taken by the Special Judge of the Economic Offence, Dhabad, by which cognizance has been taken against the petitioner for the offences under section 276B of the I.T Act. It would be apposite to extract paragraphs 15 to 19 of the judgment;

"15. In view of the above facts and arguments of both the parties, the Court has gone through the materials available on record. For ready reference, 276 (B) of the said Act is quoted hereinbelow:-

"276 (B) Failure to pay tax to the credit of the Central Government under Chapter XII-D or Chapter XVII-B Section 276B of the Income Tax Act, 1961 lays down that if a person fails to pay to the credit of the Central Government:

(I) The tax deducted at source by him as required by or under the provisions of Chapter XVII-B; or

(II) The tax payable by him, as required by or under

(a) Sub-section (2) of section 115-O; or

(b) The second proviso to section 194B, within the prescribed time, as above, the tax deducted at source by him, he shall be punishable with rigorous imprisonment for a term which shall be between 3 months and 7 years, along with fine."

16. Section 201 (1A) of the Act is also quoted hereinbelow, which speaks as follows:-

"(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the

tax as required by or under this Act, he or it shall be liable to pay simple interest.-

(i) at one per cent, for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and

(ii) at one end one-half per cent, for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid, and such interest shall be paid before furnishing the statement in accordance with the provisions of sub-section (3) of section 200."

Provided that in case any person, including the principal officer of a company fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident but is not deemed to be an assessee in default under the first provision to sub-section (1), the interest under clause (i) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident".

17. It is an admitted fact that the TDS amount in all these cases were deposited with interest and the chart with respect to the same is also annexed with the counter affidavit of the Income Tax Department, wherein the date of deduction and date of depositing the said amount has been mentioned. However, some delay occurred in depositing the TDS. Apart from one or two cases, the deducted amount are not more than 50,000/-. While passing the sanction under Section 279 (1) of the Act, the sanctioning authority has not considered the CBDT instructions, bearing F. No.255/339/79-IT (Inv.) dated 28.05.1980, issued in this regard by the CBDT. The CBDT guidelines was considered by the Patna High Court in the case of Sonali Autos (P) Ltd. (supra) and after considering this guidelines, the Court has interfered with the matter and quashed the entire criminal proceedings. In CBDT instructions, it is mentioned that prosecution under Section 276 (B) of the Act shall not normally be proposed when the amount involved and/or the period of default is not substantial and the amount in default has also been deposited in the meantime to the credit of Government. No such consideration will, of course, apply to levy of interest under Section 201 (1A) of the Act. This is quoted in the case of Sonali Autos (P) Ltd. (Supra). Moreover after receiving the deducted amount with interest, the prosecution has been launched against the petitioners, which is not in accordance with law. If the petitioners failed to deposit the amount in question within the stipulated time i.e by the 7 th day of the subsequent month, it was required to launch the prosecution immediately, which has not been done in the cases in hand. Moreover Section 278 (AA) of

the Act clearly states that no person for any failure referred to under Section 276(B) of the Act shall be punished under the said provisions, if he proves that there was reasonable cause for such failure. The judgment relied by Ms Amrita Sinha, the CBDT guidelines were not considered. On this ground these cases are distinguishable in view of the facts and circumstances of the cases relied upon by Ms. Amrita Sinha.

18. The amount has already been deposited with interest and there is no reason why the criminal proceeding shall proceed and the criminal proceeding was launched after receiving the said amount with interest, had it been a case that the case was immediately instituted and thereafter the TDS amount has been deposited with interest, the matter would have been different. As such the continuation of the proceedings will amount to an abuse of the process of the Court.

19. Accordingly, the entire criminal proceedings and the cognizance orders in their respective cases, passed by the learned Special Economic Offices, Dhanbad, in the respective C.O. Cases, whereby cognizance has been taken against the petitioners for the offences under Sections 276 (B) and 278 (B) of the Income Tax Act, pending in the Court of learned Special Judge, Economic Offences, Dhanbad, are hereby, quashed".

[30] The ratio laid down by the Jharkhand High Court would be squarely applicable to the present set of facts which are identical. In the said case also, the petitioners had already deposited TDS amount with interest and that the case was instituted against the petitioners after considerable lapse of time. The learned Judge referred the CBDT instructions, bearing F. No. 255/339/79-IT (Inv.) dated 28.05.1980. The said guidelines issued by the CBDT were also considered by the Patna High Court in case of **Sonali Autos (P) Ltd vs The State Of Bihar and others**, 2017 396 ITR 636 (Patna) , and had interfered with the matter while quashing the entire criminal proceedings.

[31] A Special Leave Petition (Criminal) Diary No (s). 3073 of 2023 challenging the judgment of the Jharkhand has been preferred by the Revenue in the Supreme Court. However, the Supreme Court, upon hearing the Counsel, dismissed the SLP on the ground that it did not find any merit. Thus, the Supreme Court has also not interfered with the verdict rendered by the Jharkhand High Court. The decision in the case of **Madhumilan Syntex Ltd Vs. Union of India and another** (supra) thus can be distinguished in light of above discussion.

[32] Before considering judicial analysis made in case of **Bee Gee Motors & Tractors and another Vs. Income Tax Officer**, 1996 218 ITR 155 [(Punj. & Har.), 157-158] , it would be expedient to refer to CBDT Circular bearing F. No.255/339/79-IT (Inv.) dated 28th May, 1980 in this context. Section 276B deals with prosecution for failure to pay tax deducted at source. Prosecution under section 276B should not

normally be proposed when the amount involved and/or the period of default is not substantial and the amount in default has also been deposited in the meantime to the credit of the Government. No such situation will, of course, apply to levy of interest under Section 201 (1A) of the I.T Act. In **Bee Gee Motors & Tractors Vs. Income Tax Officer** (supra), it has been observed at pages 157 to 158 and I quote;

> **JUDICIAL ANALYSIS**
>
> "EXPLAINED IN - The above Instruction was explained in the High Court judgment cited above, as follows:
>
> 'The words'"not normally" precede the words "be proposed when the amount involved and/or the period of default is not substantial and the amount has also been deposited in the meantime to the credit of the Government". It is true that the word "normally" does not mean that it is necessary or incumbent upon the authorities concerned so as not to launch proceedings under section 276B but when the conditions for exempting the assessee from prosecution as spelled out in the instructions are available, in the considered view of this Court it will not be open for the authorities then also to have discretion in the matter as otherwise, the authorities concerned may exempt an assessee from the prosecution in one set of circumstances and to prosecute another assessee in the same or identical facts. That would undoubtedly be violative of article 14 of the Constitution of India. The argument of Mr. Sawhney with regard to discretion of the officer concerned can be accepted only to the extent that as to what facts constitute the discretion for launching the prosecution and what facts would entail exemption from prosecution shall always depend upon the facts of each case with regard to the amount involved or the period of default. That is always in the discretion of the authorities concerned which, of course, again is to be used in a judicious manner. In so far as the first contention of Mr. Sawhney that it is the provisions of the statute which shall have precedents and not the instructions is concerned, suffice it to say that the court does not find any inconsistency or contradiction in the relevant provisions of the statute and the instructions quoted above. The relevant provision of the statute no doubt talks of prosecution but the instructions in the considered view of the court provide an exception in limited matters and that too where the conditions precedent in the instructions are available or in existence..."

[33] Mr. Jain has also pressed into service a recent judgment of Orissa High Court in case of Sree Metaliks Ltd. Vs. Union of India,2024 162 Taxmann.com 161 (Orissa) , wherein there is reference of CBDT Circular dated 24th April, 2008 which came into being after the decision in the case of **Madhumilan Syntex Ltd and others Vs Union of India and another** (supra). Cases, where amount of tax deducted is Rs.25,000/- or more, and the same is not deposited even within twelve months from the date of

deduction, especially, proceeded for prosecution in addition to the recovery steps as may be necessary in such cases. The Authority for processing the prosecution under the said section shall be the officer having jurisdiction over TDS cases. The prosecution shall preferably be launched within sixty days of such deduction. If any such default is detected during search/survey, the processing ADIT/DDIT or the authorized officer shall inform the A.O having jurisdiction over TDS forthwith.

[34] In case of **Sree Metaliks Ltd. Vs. Union of India** (supra), the petitioner was being prosecuted in view of Section 276B r/w Section 278B and 279 of the I.T Act on the basis of failure to pay tax on distributing profits of domestic companies/deducted at source for the Assessment Year 2021-21. The assessee failed to deposit TDS amount for financial year 2019-20 within statutory period, leading to complaint case under Sections 276B and 278B. Despite specifically depositing TDS amount with interest, prosecution was sanctioned under Section 279 (1) of the I.T Act. The assessee had explained that the delay was due to factors like market sluggishness, insolvency proceedings and COVID-19 pandemic with no mens rea involved. It is held that the Authorities ought to have taken into consideration explanation offered by assessee, particularly for the reasons that the Company had suffered insolvency and bankruptcy proceedings and restrictions imposed during COVID-19 Pandemic. Since the prosecution had been initiated by the Revenue after having received TDS amount along with interest, it is held that in such circumstances, entire proceeding initiated against the assessee was to be quashed.

[35] A combine reading of Circulars dated 28th May, 1980 and 24th April, 2008 contemplate that prosecution ought not be launched where the tax has been deposited. The words "where the amount of default has been deposited in the meantime" in the Circular dated 28th May, 1980 signify such intent and the words "in addition to the recovery steps as may be necessary in such cases" in Circular dated 24th April, 2008 also signify that there are pending arrears which need to be recovered. Mr. Jain is, therefore, right in his contention that the ratio laid down in **Madhumilan Syntex Ltd and others Vs Union of India and another** (supra), would not be made applicable in view of the Circular dated 24th April, 2008 and, therefore, it cannot be treated as a precedent for the period after 24th April, 2008. It is also expedient to note that Circular dated 24th April, 2008 prescribes that the prosecution is to be launched within sixty days of deduction of the default. Though the circular also prefixes the requirement with the words "preferably", it also signify that if not in sixty days the period cannot extend indefinitely for an unreasonable period. If Section 276B is interpreted to include the delay in deposit of TDS would make the said provision manifestly arbitrary.

[36] Turning to the definition of "Principal Officer" as contemplated in Section 2 (35) of the IT Act which requires the assessing officer to issue notice to any person connected with the management or administration of the company for his intention of

treating him as the 'Principal Officer" thereof. The obligation, however, does not end with merely a notice. Section 201 (1), Proviso to Section 201 (1) and 201 (3) of the I.T Act make it mandatory for the assessing officer to pass an order. The order is also appealable under section 246 (1) (i) of the I.T Act. The order would:-

(a) Determine which officer is proposed to be dealt as "Principal Officer" of the Company;

(b) Determine in light of the exclusion under the proviso to section 201 (1), whether the company and its Principal Officer should be "deemed to be Assessee in Default".

[37] Section 2 (35) (b) of the I.T Act postulates the Assessing Officer to issue notice of his "intention to treat" a person connected with the management and administration of the company as it's "Principal Officer". This point has been enunciated by this Court in a decision in the case of **Homi Phiroz Ranina and others Vs. State of Maharashtra and others**, 2003 263 ITR 636 wherein the applicants sought quashing of an order dated 30th November, 1996 passed by the Additional Chief Metropolitan Magistrate, 47th Court, Bandra, inter alia, prayed for their discharge. It was a complaint filed by the Income Tax Officer TDS, VI, Bombay against the applicants as well as Unique Oil India Ltd stating therein that the applicants/accused are Directors as well as Chairman and Managing Director of accused No.1 Company. They were charged under Section 276B r/w 278B of the I.T Act. Summons were issued to all the accused persons including the applicants. They moved for discharge which came to be rejected by the Magistrate and, therefore, they approached this Court. A Single Judge of this Court made following observations;

> "4. It is the contention of the applicants/accused that they are not the principal Officers of the said company Accused No.1. They are only the non executive Directors of the Company. Accused No.2 L.K Khosla is the Chairman and Managing Director and accused No.8 Yogesh Khosla is whole time Director of the said Company and hence, the liability for deducting income tax and crediting to the Central Government is that of accused No.2, 8 and Company, accused No.1. It is also contended that no notice was given by the Commissioner of Income Tax to the applicant/accused prior to his granting sanction to prosecute the accused under section 279 (1) of the Act. Principles of natural justice required that the notice ought to have been given to the applicants by the Commissioner before according sanction.
>
> 5. The aforesaid submissions were made by the applicants before the learned Magistrate at the time of hearing their application for discharge. However, the learned Magistrate rejected the said contention by a speaking order. The learned Advocate Mr. Ranina for the applicants/accused has submitted that the applicants being non-executive Directors are not concerned with the day-today affairs of the Company which are looked after by the Managing

Director and whole time Director. Admittedly no administrative responsibilities were shouldered by the applicants. Furthermore applicant Nos.1 and 3 are also practising Advocates and therefore, they cannot by law act as full time Directors. They could only act as non-executive Directors not exercising any administrative powers or performing any administration duties.

13. Unless the complaint disclosed a prima facie case against the applicants/ accused of their liability and obligation as Principal Officers in the day to day affairs of the Company as Directors of the Company under section 278 (b) the applicants cannot be prosecuted for the offences committed by the Company. In the absence of any material in the complaint itself prima facie disclosing responsibility of the accused for the running of the day to day affairs of the Company process could not have been issued against them. The applicants cannot be made to undergo the ordeal of a trial unless it could be prima facie showed that they are legally liable for the failure of the Company in paying the amount deducted to the credit of the Company. Otherwise, it would be a travesty of justice to prosecute them and ask them to prove that the offence is committed without their knowledge. The Supreme Court in the case of **Shyam Sundar v. State of Haryana**, 1989 4 SCC 630: A.I.R 1984 page 53 held as follows:-

"It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to sub-section (1) that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible, for carrying on the business and was during the relevant time in charge of the business. In the absence of any such proof no partner could be convicted".

[38] It can, thus, be seen that merely issuance of notice would not ipso facto become a final "determination" of classification and identification of a person as "Principal Officer". Since treating a person as such would not only have Civil but also penal consequences. As such, an order making such determination is necessary. The said "adjudication" is contemplated under Section 201 when such person (other than a Company) is held to be a Principal Officer and is also thereafter deemed to be an assessee in default. Any person aggrieved by such order would have remedies available under Section 246 (1) (i) of the I.T Act. There is one more significant aspect to be noted which is the term "Principal Officer" has been used "singular" and not in 'plural' and the word "officer" is further premised by the word "principal" which

signifies "main" officer and not all the officers who may someway connected with the management or administration of the company. The said "determination" can, therefore, be done only while passing an order under section 201 (1) of the I.T Act. Section 204 (iii) of the I.T Act also defines and fixes the responsibility for paying tax in relation to the company on its "Principal Officer".

[39] Now, turning to the application of sub-section (1) of Section 278B of the I.T Act which reads thus;

> **"278B.** (1) Where an offence under this Act has been committed by a company in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:
>
> **Provided** that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.
>
> (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
>
> [(3) Where an offence under this Act has been committed by a person, being a company, and the punishment for such offence is imprisonment and fine, then, without prejudice to the provisions contained in sub-section (1) or sub-section (2), such company shall be punished with fine and every person, referred to in sub-section (1), or the director, manager, secretary or other officer of the company referred in sub-section (2), shall be liable to be proceeded against and punished in accordance with the provisions of this Act.]
>
> Explanation.- For the purposes of this section,-
>
> (a) "company" means a body corporate, and includes-
>
> (i) a firm; and
>
> (ii) an association of persons or a body of individuals whether incorporated or not; and
>
> (b) "director", in relation to-

(i) a firm, means a partner in the firm;

(ii) any association of persons, or a body of individuals, means any member controlling the affairs thereof.]

[40] Since the provision is squarely for prosecuting an offender, the term 'conduct of business of the Company" must have a nexus with "the offence committed" and hence, in the context of such offence under section 276B ought to be interpreted (which is in relation to "failure to pay" the TDS deducted) to be the "Principal Officer" who has been made responsible, under Section 204 (iii) of the I.T Act, for paying the tax. Proviso to Section 278B (1) prescribes 'absence of knowledge' as a valid defence for invoking the said section. Where a person is declared a principal officer of a company by an "order" under section 201 (1), it would, prima facie, fulfill the requirement of presumption of knowledge. The term "Director" which has been separately defined under section 2 (20) of the I.T Act has not been used in Section 278B (1). As such director is not covered thereunder.

[41] Turning to sub-section (2) of Section 278B of the I.T Act which commences with non obstante clause "provides an action to prosecute a person which expressly applies to a Director. Emphasis is on the words "with the consent", "connivance" or "attributable to the neglect" of such Director, Manager, Secretary or other office of the company. The offence in the present case being an offence under Section 276B of the I.T Act would, therefore, imply that the "failure to pay" the TDS deducted, must have direct relation namely consent, connivance or neglect of such person.

[42] A useful reliance has been placed upon a decision in the case of **Dayle De Souza Vs. Government of India through Deputy Chief Labour Commissioner (C) and another**, 2021 20 SCC 135 . While interpreting section 22-C (1) and (2) of the Minimum Wages Act, 1948 which relates to offence of firm and vicarious liability, the Supreme Court enunciated necessity of requirements under each of the sub-sections. It is held that the requirements of Section 22-C (2) are different from those of Section 22-C (1). Relevant paragraphs are extracted below;

"9. However, in the context of the present appeal, it is Section 22-C of the Act which is of more relevance which reads thus:

"22C. Offences by companies. - (1) If the person committing any offence under this Act is a company, every person who at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the

offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any Director, manager, secretary or other officer of the company, such Director, manager, secretary or other officer of the company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. - For the purposes of this section -

(a) **"company"** means any body corporate and includes a firm or other association of individuals; and

(b) **"Director"** in relation to a firm means a partner in the firm."

10. Sub-section (1) to Section 22-C states that where an offence is committed by a company, every person who at the time the offence was committed was in-charge of and was responsible to the company for the conduct of the business, as well as the company itself shall be deemed to be guilty of the offence. By necessary implication, it follows that a person who does not bear out the requirements is not vicariously liable under Section 22-C(1) of the Act. The proviso, which is in the nature of an exception, states that a person who is liable under sub-section (1) shall not be punished if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. The onus to satisfy the requirements to take benefit of the proviso is on the accused, but it does not displace or extricate the initial onus and burden on the prosecution to first establish the requirements of sub-section (1) to Section 22-C of the Act. The proviso is to give immunity to a person who is vicariously liable under sub-section (1) to section 22-C of the Act.

11. In **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla**, 2005 8 SCC 89 in relation to pari materia proviso in Section 141 of the Negotiable Instruments Act, 1881, this Court observed: (SCC pp. 96 & 98, paras 4 & 9)

"4... A company being a juristic person, all its deeds and functions are the result of acts of others. Therefore, officers of a company who are responsible for acts done in the name of the company are sought to be made personally liable for acts which result in criminal action being taken against the company. It makes every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of business of the company, as well as the company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able

to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence.

9. The position of a Managing Director or a Joint Managing Director in a company may be different. These persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141(1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence."

(Emphasis added)

12. In **Aneeta Hada v. Godfather Travels & Tours (P) Ltd**, 2012 5 SCC 661 this Court had reiterated that the proviso to general vicarious liability under Section 141 of the Negotiable Instruments Act, 1881, applies as an exception, by observing: (SCC p. 678, para 22)

"22. On a reading of the said provision, it is plain as day that if a person who commits the offence under Section 138 of the Act is a company, the company as well as every person in charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. The first proviso carves out under what circumstances the criminal liability would not be fastened. Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. It is worth noting that in both the provisions, there is a "deemed" concept of criminal liability."

(Emphasis added)

The proviso being an exception cannot be made a justification or a ground to launch and initiate prosecution without the satisfaction of conditions under sub-section (1) of Section 22-C of the Act. The proviso that places the onus to prove the exception on the accused, does not reverse the onus under the main provision, namely Section 22-C(1) of the Act, which remains on the prosecution and not on the person being prosecuted.

13. Sub-section (2) states that notwithstanding anything contained in sub-section (1), where any offence under the Act has been committed by a company, and it is proved that such offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any Director, manager, secretary or other officer of the company, then such Director, manager, secretary or other officer of the company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against

> and punished accordingly. Without much ado, it is clear from a reading of sub-section (2) to Section 22-C of the Act that a person cannot be prosecuted and punished merely because of their status or position as a Director, manager, secretary or any other officer, unless the offence in question was committed with their consent or connivance or is attributable to any neglect on their part. The onus under sub-section (2) to Section 22-C is on the prosecution and not on the person being prosecuted".

[43] It is needless to reiterate the ratio laid down by the Supreme Court in the case of **Dayle De'Souza Vs. Union of India through Deputy Chief Labour Commissioner (C) and another** (supra) since it is incumbent upon the Revenue to prove that the offence in question has been committed with the consent or connivance or is attributable to any neglect on the part of, any Director, Manager, Secretary or other officer of the company, such Director, Manager, Secretary or other officer of the Company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. This is also in pari materia with the vicarious liability under section 141 of the Negotiable Instruments Act, 1881, as has been observed in paragraph 12 (supra).

[Emphasis supplied]

[44] In the present case, the Revenue has chosen not to invoke the provisions of Section 221 r/w Section 201 (1) of the I.T Act to impose penalty against the company or the principal officer of the company for "failure to pay the whole or any part of tax, as required by or under this Act". The Revenue cannot now be permitted to prosecute the petitioners for the same substantive act which is also categorized as an "offence" under Section 276B of the I.T. Act. As such, further trial of the petitioners by the criminal Court cannot be permissible which would tantamount to abuse of process of the Court. The Counsel has, therefore, rightly placed reliance on a decision in the case of **K.C. Builders Vs. Assistant Commissioner of Income-Tax**, 2004 135 TAXMAN 461 (SC) . It would be apposite to extract relevant paragraph which reads thus;

> "14.....One of the amendments made to the abovementioned provisions is the omission of the word "deliberately" from the expression "deliberately furnished inaccurate particulars of such income". It is implicit in the word "concealed" that there has been a deliberate act on the part of the assessee. The meaning of the word "concealment" as found in Shorter Oxford English Dictionary, 3rd Edition, Vol. I, is as follows:-
>
> "In law, the intentional suppression of truth or fact known, to the injury or prejudice of another."
>
> The word "concealment" inherently carries with it the element of mens rea. Therefore, the mere fact that some figure or some particulars have been disclosed by itself, even if takes out the case from the purview of non-

disclosure, it cannot by itself take out the case from the purview of furnishing inaccurate particulars. Mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon. In order that a penalty under Section 271(1) (iii) may be imposed, it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of his income. Where the additions made in the assessment order, on the basis of which penalty for concealment was levied, are deleted, there remains no basis at all for levying the penalty for concealment and, therefore, in such a case no such penalty can survive and the same is liable to be cancelled as in the instant case. Ordinarily, penalty cannot stand if the assessment itself is set aside. Where an order of assessment or reassessment on the basis of which penalty has been levied on the assessee has itself been finally set aside or cancelled by the Tribunal or otherwise, the penalty cannot stand by itself and the same is liable to be cancelled as in the instant case ordered by the Tribunal and later cancellation of penalty by the authorities".

24. In the instant case, the penalties levied under Section 271(1)(c) were cancelled by the respondent by giving effect to the order of the Income Tax Appellate Tribunal in I.T.As Nos. 3129-3132. It is settled law that levy of penalties and prosecution under Section 276-C are simultaneous. Hence, once the penalties are cancelled on the ground that there is no concealment, the quashing of prosecution under Section 276-C is automatic.

25. In our opinion, the appellants cannot be made to suffer and face the rigorous of criminal trial when the same cannot be sustained in the eye of law because the entire prosecution in view of a conclusive finding of the Income Tax Tribunal that there is no concealment of income becomes devoid of jurisdiction and under Section 254 of the Act, a finding of the Appellate Tribunal supersedes the order of the Assessing Officer under Section 143(3) more so when the Assessing Officer cancelled the penalty levied.

26. In our view, once the finding of concealment and subsequent levy of penalties under Section 271(1)(c) of the Act has been struck down by the Tribunal, the Assessing Officer has no other alternative except to correct his order under Section 154 of the Act as per the directions of the Tribunal. As already noticed, the subject - matter of the complaint before this Court is concealment of income arrived at on the basis of the finding of the Assessing Officer. If the Tribunal has set aside the order of concealment and penalties, there is no concealment in the eyes of the law and, therefore, the prosecution

> cannot be proceeded with by the complainant and further proceedings will be illegal and without jurisdiction. The Assistant Commissioner of Income Tax cannot proceed with the prosecution even after the order of concealment has been set aside by the Tribunal. When the Tribunal has set aside the levy of penalty, the criminal proceedings against the appellants cannot survive for further consideration. In our view, the High Court has taken the view that the charges have been framed and the matter is in the stage of further cross-examination and, therefore, the prosecution may proceed with the trial. In our opinion, the view taken by the learned Magistrate and the High Court is fallacious. In our view, if the trial is allowed to proceed further after the order of the Tribunal and the consequent cancellation of penalty, it will be an idle and empty formality to require the appellants to have the order of the Tribunal exhibited as a defence document inasmuch as the passing of the order as aforementioned is unsustainable and unquestionable".

The ratio laid down in the aforesaid decision is squarely applicable to the present set of facts.

[45] The Hon'ble Supreme Court in the case of **G.L. Didwania and another Vs. Income Tax Officer and another**, 1995 Supp2 SCC 724 while dealing with an appeal preferred by the assessee made following observations in paragraph 4;

> "4. In the instant case, the crux of the matter is attracted and whether the prosecution can be sustained in view of the order passed by the Tribunal. As noted above, the assessing authority held that the appellant - assessee made a false statement in respect of income of M/s. Young India and Transport Company and that finding has been set aside by the Income-tax Appellate Tribunal. If that is the position then we are unable to see as to how criminal proceedings can be sustained".

A prosecution was launched by the Revenue qua the assessee on the ground of making false statement. The Assessing Authority held that the assessee had intentionally concealed his income derived from "Y" Company which belonged to him. The appellant preferred an appeal against assessment order wherein the Appellate Tribunal set aside the assessment by holding that there was no material to hold that "Y" company belonged to assessee. A petition filed by the appellant before the Magistrate to drop the criminal proceedings, and an application moved before the High Court under Section 482 of the Cr. P.C to quash the criminal proceedings came to be dismissed. The Supreme Court, therefore, held that the whole question was whether the appellant made a false statement regarding income which, according to the assessing authority had escaped assessment. It is noted that the said issue attained finality in light of the finding of the Appellate Tribunal which was conclusive and, therefore, the prosecution could not sustain. Accordingly, the Supreme Court quashed

the criminal proceedings. The ratio laid down hereinabove would also be made applicable to the present set of facts.

[46] A corollary of the aforesaid discussion of the facts, material placed on record vis-a-vis the decisions rendered by various Courts have persuaded me to allow all the petitions. Now, to the order.

: O R D E R:

(a) Petitions are allowed.

(b) Orders of issuance of process in;

(i) C.C No.529/SW/2019 dated 16th November, 2019;

(ii) C.C. No.532/SW/2019 dated 16th November, 2019;

(iii) C.C. No.530/SW/2019 dated 16th November, 2019;

(iv) C.C. No.2365/SW/2018 dated 6th March, 2019;

(v) C.C. No.531/SW/2019 dated 16th November, 2019 and

(vi) C.C. No.27/SW/2020 dated 25th January, 2021

are quashed and set aside.

(c) Consequent orders passed in;

(i) Revision Application No.357 of 2021;

(ii) Revision Application No.360 of 2021;

(iii) Revision Application No.358 of 2021;

(iv) Revision Application No.361 of 2021;

(v) Revision Application No.359 of 2021

and

(vi) Revision Application No.163 of 2021 passed by the Additional Sessions Judge, Mumbai on 2nd May,

2022 are also quashed and set aside.

[47] The Petitions are disposed of as above with no order as to costs

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2024(2)GDCJ585

HIMACHAL PRADESH HIGH COURT

[Before Hon'ble Mr Justice Rakesh Kainthla, Judge.]

Criminal Revision No. 609 of 2022 Reserved on: 23.07.2024 Date of Decision: 12.08.2024 **dated 12/08/2024**

Balwinder Kumar

Versus

Punjab National Bank

SIGNATURE ON CHEQUE

Negotiable Instruments Act, 1881 - Sections 138, 118 and 139 - Dishonour of cheque - Complaint - Trial Court held accused did not dispute issuance of - He has also not disputed taking of loan - He stated that he had given blank cheque to bank at time of sanctioning loan - Once accused admitted his signatures on cheque, a presumption had to be drawn under Section 118 and 139 of N.I. Act - Trial Court convicted and sentence the accused - Appeal - Appellate Court upheld the judgment of trial Court - Hence revision petition - Determination of - Trial Court awarded compensation of Rs. 2,00,000/- - Amount of compensation cannot be said to be excessive - No interference is required with judgment and order of sentence passed by Courts

Law Point: Signature on cheque. - Once appellant had admitted his signatures on cheque and Deed, trial Court ought to have presumed that cheque was issued as consideration for legally enforceable debt.

નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 - કલમ 138, 118 અને 139 – ચેક વણ ચૂકવાયેલ પરત - ફરિયાદ - ટ્રાયલ કોર્ટે ઠેરવ્યું કે આરોપી એ ચેક આપવા ની તકરાર લીધેલ નથી - તેણે લોન લેવાનો પણ તકરાર લીધેલ નથી - તેમણે જણાવ્યું હતું કે લોન મંજૂર કરતી વખતે તેમણે બેંકને કોરો ચેક આપ્યો હતો - એકવાર આરોપીએ ચેક પર તેની સહીઓ કબૂલ કરી લીધા પછી એન.આઇ. એક્ટની કલમ 118 અને 139 હેઠળ એક ધારણા બાંધવી પડે. - ટ્રાયલ કોર્ટે દોષિત ઠેરવીને આરોપીને સજા ફટકારી - અપીલ - અપીલ કોર્ટે ટ્રાયલ કોર્ટના ચુકાદાને માન્ય રાખ્યો - આથી રિવિજન અરજી – તેનું નિર્ધારણ - ટ્રાયલ કોર્ટે રૂ. 2,00,000/- નું વળતર આપ્યું જે વળતરની રકમ વધુ પડતી હોવાનું કહી શકાય નહીં - અદાલતો દ્વારા પસાર કરવામાં આવેલા ચુકાદા અને સજાના હુકમમાં કોઈ હસ્તક્ષેપની જરૂર નથી.

કાયદાનો મુદ્દો: ચેક પર સહી. - એકવાર અરજદારે ચેક પર અને દસ્તાવેજ પર તેની સહીઓ કબૂલ કરી લીધી હતી અને તેથી ટ્રાયલ કોર્ટે એવું માની લેવું જોઈએ કે ચેક કાયદેસર રીતે લાગુ કરી શકાય તેવા દેવાની ચુકવણી તરીકે આપવામાં આવ્યો હતો.

Acts Referred:

Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970
Code of Criminal Procedure, 1973 Sec. 313
Negotiable Instruments Act, 1881 Sec. 118, Sec. 138, Sec. 139

Counsel:

For the Petitioner: M r. Shubham Sood, Advocate.

For the Respondent: Mr. Arvind Sharma, Advocate.

JUDGEMENT

Rakesh Kainthla, Judge.- The petitioner has filed the present petition against the judgment dated 01.10.2022, passed by learned Sessions Judge, Kangra at Dharamshala, H.P. (learned Appellate Court) vide which the appeal filed by the petitioner (appellant before the learned First Appellate Court) was dismissed and the judgment and order passed by learned Additional Chief Judicial Magistrate, Kangra, District Kangra, H.P. (learned Trial Court) were upheld.(Parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).

2. Briefly stated, the facts giving rise to the present petition are that the complainant filed a complaint before the learned Trial Court stating that it is a body corporate constituted under the Banking Company (Acquisition and Transfer of Undertaking) Act, 1970. It is engaged in the banking business and one of its branches is located at Gaggal Tehsil and District Kangra, H.P. The accused obtained a KCC loan of Rs. 1,00,000/-on 16.03.2012. He agreed to return the loan with an interest of at the rate of 7% per annum. The accused failed to repay the loan and his account became Non-Performing Assets (NPA). The accused issued a cheque of Rs. 1,17,000/- for discharging his liability. The complainant presented the cheque but the same was dishonoured with the endorsement "Funds Insufficient". The complainant issued a legal notice to the accused asking him to pay the amount within 15 days from the date of receipt of the notice but the accused failed to pay the amount within the specified period. Hence, the complaint was filed for taking action against the accused as per the law.

3. The learned Trial Court summoned the accused and put the notice of accusation to him for the commission of an offence punishable under Section 138 of the Negotiable Instruments Act (for short N.I.Act). The accused pleaded not guilty and claimed to be tried.

4. The complainant examined Kimat Rai (CW-1) to prove its case.

5. The accused in his statement recorded under Section 313 of Cr.P.C. admitted that the complainant is a bank engaged in the banking activities. He admitted that he had taken a loan of ¹ 1,00,000/-, which was to be repaid with interest @7% per annum. He stated that he had given blank cheque to the bank at the time of sanctioning the loan. He admitted that the cheque was presented before the bank and the same was dishonoured. He stated that he had deposited some of the amounts after the receipt of the notice. He wanted to settle the amount under the "One Time Settlement Scheme" (OTS). He tendered the documents in his defence.

6. Learned Trial Court held that the accused did not dispute the issuance of the cheque. He has also not disputed the taking of the loan. He claimed that he had issued a blank cheque but that will not help him. Once the accused admitted his signatures on the cheque, a presumption had to be drawn under Sections 118 and 139 of the N.I. Act that the cheque was issued in discharge of legal his liability. The accused failed to rebut this presumption. Hence, he was convicted for the commission of an offence punishable under Section 138 of N.I.Act and sentenced to undergo simple imprisonment for one year and pay a compensation of Rs. 2,00,000/- and in default of payment of compensation to further undergo simple imprisonment for 6 months.

7. Being aggrieved from the judgment and order passed by the learned Trial Court, the accused filed an appeal, which was dismissed by learned Sessions Judge, Kangra at Dharamshala, H.P. (learned First Appellate court). Learned First Appellate Court held that the accused admitted the issuance of a signed cheque. He also admitted that he had taken the loan from the bank. The admission of the signatures will attract the presumption under Sections 118 and 139 of the N.I. Act. It was proved on record that the loan was not repaid. Hence, the cheque was issued for discharging the legal liability. It was dishonoured due to insufficient funds and the accused had failed to pay the amount despite the receipt of the notice. Hence, he was rightly convicted and sentenced by the learned Trial Court.

8. Feeling aggrieved and dissatisfied with the judgments and order of conviction passed by the learned Courts below, the accused has filed the present revision, asserting that the learned Courts below failed to appreciate the material on record. They misread and misconstrued the evidence and made wrong assumptions. The accused had already repaid the substantial amount of loan and only a small amount was to be repaid. Disproportionate compensation was awarded by the learned Trial Court; therefore, it was prayed that the present petition be allowed and the judgments and orders passed by the learned Courts below be set aside.

9. I have heard Mr Shubham Sood, learned counsel for the petitioner/accused and Mr Arvind Sharma, learned Counsel for the respondent-complainant.

10. Mr Shubham Sood, learned Counsel for the accused/ petitioner submitted that the learned Courts below erred in convicting and sentencing the accused. It was not proved that the accused had a liability to pay Rs. 1,17,000/- on the date of issuance of the cheque. The plea taken by the accused that his blank signed cheques were taken at the time of disbursal of the loan was probable. The cheque was the security cheque and the same was misused by the bank. The accused had paid a substantial amount and this amount was not considered while imposing the punishment. Therefore, he prayed that the judgments and order of sentence passed by the learned Courts below be set aside.

11. Mr. Arvind Sharma, learned counsel for the complainant-respondent supported the judgments and order of sentence passed by the learned Courts below and submitted

that no interference is required with the same. He prayed that the present revision petition be dismissed.

12. I have given considerable thought to the submission made given at the bar and have gone through the records carefully.

13. It was laid down by the Hon'ble Supreme Court in Malkeet Singh Gill v. State of Chhattisgarh, (2022) 8 SCC 204: (2022) 3 SCC (Cri) 348: 2022 SCC OnLine SC 786 that the revisional court is not an appellate Court and it can only rectify the patent defect, errors of Court or the law. It was observed on page 207:-

"10. Before adverting to the merits of the contentions, at the outset, it is apt to mention that there are concurrent findings of conviction arrived at by two courts after a detailed appreciation of the material and evidence brought on record. The High Court in criminal revision against conviction is not supposed to exercise the jurisdiction like to the appellate court and the scope of interference in revision is extremely narrow. Section 397 of the Criminal Procedure Code (in short "CrPC") vests jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior court. The object of the provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error which is to be determined on the merits of individual cases. It is also well settled that while considering the same, the Revisional Court does not dwell at length upon the facts and evidence of the case to reverse those findings.

14. This position was reiterated in State of Gujarat v. Dilipsinh Kishorsinh Rao, 2023 SCC OnLine SC 1294 wherein it was observed:

> "13. The power and jurisdiction of the Higher Court under Section 397 Cr. P.C. which vests the court with the power to call for and examine records of an inferior court is for the purposes of satisfying itself as to the legality and regularities of any proceeding or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law or the perversity which has crept into such proceedings. It would be apposite to refer to the judgment of this court in Amit Kapoor v. Ramesh Chandra, (2012) 9 SCC 460 where the scope of Section 397 has been considered and succinctly explained as under:
>
> "12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise the orders, which upon the face of it bear a token of careful consideration and appear to be in accordance with the law. If one

looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes but are merely indicative. Each case would have to be determined on its own merits.

13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex-facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in the exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much- advanced stage in the proceedings under the CrPC."

15. The accused in his statement recorded under Section 313 of Cr.P.C. did not dispute that he had taken a loan of Rs. 1,00,000/- which carried the interest @ 7% per annum.. He also admitted that the loan account was declared as NPA. He stated that he had issued a blank cheque to the bank at the time of sanctioning of the loan and the same was misused by the complainant-bank. Thus, the major part of the complainant's case was admitted by him. He also filed a statement of account Mark 'DX', in which it was mentioned that an amount of Rs. 1,17,254/- was due on 23.02.2018. This statement of account shows that a more than amount of Rs. 1,17,000/- was due on 01.09.2018 when the cheque was issued. The statement of account filed by the accused corroborates the complainant's version that the accused had issued the cheque in the discharge of his legal liability.

16. The accused admitted issuance of the signed cheque. It was laid down by this Court in Naresh Verma vs. Narinder Chauhan 2020(1) Shim. L.C. 398 that where the accused had not disputed his signatures on the cheque, the Court has to presume that it was issued in discharge of legal liability and the burden would shift upon the accused to rebut the presumption. It was observed:-

"8. Once signatures on the cheque are not disputed, the plea with regard to the cheque having not been issued towards discharge of lawful liability, rightly came to be rejected by learned Courts below. Reliance is placed upon Hiten P. Dalal v. Bartender NathBannerji, 2001 (6) SCC 16, wherein it has been held as under:

"The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when

its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted"

9. S.139 of the Act provides that it shall be presumed unless the contrary is proved, that the holder of a cheque received the cheque of nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

17. Similar is the judgment in Basalingappa vs. Mudibasappa 2019 (5) SCC 418 wherein it was held:

24. Applying the proposition of law as noted above, in the facts of the present case, it is clear that the signature on the cheque having been admitted, a presumption shall be raised under Section 139 that the cheque was issued in discharge of debt or liability.

18. This position was reiterated in M/S KalamaniTex and another Versus P. Balasubramanian 2021 (5) SCC 283 wherein it was held:

"14. Adverting to the case in hand, we find on a plain reading of its judgment that the trial Court completely overlooked the provisions and failed to appreciate the statutory presumption drawn under Section 118 and Section 139 of NIA. The Statute mandates that once the signature(s) of an accused on the cheque/negotiable instrument are established, then these 'reverse onus' clauses become operative. In such a situation, the obligation shifts upon the accused to discharge the presumption imposed upon him. This point of law has been crystallized by this Court in RohitbhaiJivanlal Patel v. State of Gujarat (2019) 18 SCC 106, 18 in the following words:

"In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the trial court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the trial court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the appellant-accused "

15. Once the 2nd Appellant had admitted his signatures on the cheque and the Deed, the trial Court ought to have presumed that the cheque was issued as

consideration for a legally enforceable debt. The trial Court fell in error when it called upon the Complainant-Respondent to explain the circumstances under which the appellants were liable to pay. Such an approach of the trial Court was directly in the teeth of the established legal position as discussed above and amounts to a patent error of law.

16. No doubt, and as correctly argued by senior counsel for the appellants, the presumptions raised under Section 118 and Section 139 are rebuttable in nature. As held in MS Narayana Menon v. State of Kerela (2006) 6 SCC 39, 32, which was relied upon in Basalingappa (supra), a probable defence needs to be raised, which must meet the standard of "preponderance of probability", and not a mere possibility. These principles were also affirmed in the case of Kumar Exports (supra), wherein it was further held that bare denial of passing of consideration would not aid the case of the accused."

19. Similar is the judgment in APS Forex Services (P) Ltd. v. Shakti International Fashion Linkers(2020) 12 SCC 724, wherein it was observed:-

7.2. What is emerging from the material on record is that the issuance of a cheque by the accused and the signature of the accused on the said cheque are not disputed by the accused. The accused has also not disputed that there were transactions between the parties. Even as per the statement of the accused, which was recorded at the time of the framing of the charge, he has admitted that some amount was due and payable. However, it was the case on behalf of the accused that the cheque was given by way of security and the same has been misused by the complainant. However, nothing is on record that in the reply to the statutory notice it was the case on behalf of the accused that the cheque was given by way of security. Be that as it may, however, it is required to be noted that earlier the accused issued cheques which came to be dishonoured on the ground of "insufficient funds" and thereafter a fresh consolidated cheque of Rs. 9,55,574 was given which has been returned unpaid on the ground of "STOP PAYMENT". Therefore, the cheque in question was issued for the second time. Therefore, once the accused has admitted the issuance of a cheque which bears his signature, there is a presumption that there exists a legally enforceable debt or liability under Section 139 of the NI Act. However, such a presumption is rebuttable in nature and the accused is required to lead the evidence to rebut such presumption. The accused was required to lead evidence that the entire amount due and payable to the complainant was paid.

9. Coming back to the facts in the present case and considering the fact that the accused has admitted the issuance of the cheques and his signature on the cheque and that the cheque in question was issued for the second time after the earlier cheques were dishonoured and that even according to the accused some amount was due and payable, there is a presumption under Section 139 of the NI Act that there exists a legally enforceable debt or liability. Of course, such presumption is rebuttable in

nature. However, to rebut the presumption, the accused was required to lead the evidence that the full amount due and payable to the complainant had been paid. In the present case, no such evidence has been led by the accused. The story put forward by the accused that the cheques were given by way of security is not believable in the absence of further evidence to rebut the presumption and more particularly the cheque in question was issued for the second time after the earlier cheques were dishonoured. Therefore, both the courts below have materially erred in not properly appreciating and considering the presumption in favour of the complainant that there exists legally enforceable debt or liability as per Section 139 of the NI Act. It appears that both, the learned trial court as well as the High Court, have committed an error in shifting the burden upon the complainant to prove the debt or liability, without appreciating the presumption under Section 139 of the NI Act. As observed above, Section 139 of the Act is an example of reverse onus clause and therefore, once the issuance of the cheque has been admitted and even the signature on the cheque has been admitted, there is always a presumption in favour of the complainant that there exists legally enforceable debt or liability and thereafter, it is for the accused to rebut such presumption by leading evidence.

20. Learned Counsel for the complainant rightly submitted that there is a presumption under Section 139 of the N.I.Act that the cheque was issued in the discharge of the legal liability. This presumption was explained by the Hon'ble Supreme Court in Triyambak S. Hegde Versus Sripad 2022 (1) SCC 742 as under:

> "11. From the facts arising in this case and the nature of the rival contentions, the record would disclose that the signature on the documents at Exhibits P-6 and P-2 is not disputed. Exhibit P-2 is the dishonouredcheque based on which the complaint was filed. From the evidence tendered before the JMFC, it is clear that the respondent has not disputed the signature on the cheque. If that be the position, as noted by the courts below a presumption would arise under Section 139 in favour of the appellant who was the holder of the cheque. Section 139 of the N.I. Act reads as hereunder:-
>
> "139. Presumption in favour of holder- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."
>
> 12 Insofar as the payment of the amount by the appellant in the context of the cheque having been signed by the respondent, the presumption for the passing of the consideration would arise as provided under Section 118(a) of N.I. Act which reads as hereunder: -
>
> "118. Presumptions as to negotiable instruments -
>
> Until the contrary is proved, the following presumptions shall be made: -

(a) of consideration - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration."

13. The above-noted provisions are explicit to the effect that such presumption would remain until the contrary is proved. The learned counsel for the appellant in that regard has relied on the decision of this Court in K. Bhaskaran vs. SankaranVaidhyanBalan&Anr., 1999 (7) SCC 510 wherein it is held as hereunder:

"9. As the signature in the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date on which the cheque bears. Section 139 of the Act enjoins the Court to presume that the holder of the cheque received it for the discharge of any debt or liability. The burden was on the accused to rebut the aforesaid presumption. The Trial Court was not persuaded to rely on the interested testimony of DW1 to rebut the presumption. The said finding was upheld by the High Court. It is not now open to the accused to contend differently on that aspect."

14. The learned counsel for the respondent has however referred to the decision of this Court in Basalingappa vs. Mudibasappa, 2019 (5) SCC 418 wherein it is held as hereunder: -

"25. We having noticed the ratio laid down by this Court in the above cases on Sections 118 (a) and 139, we now summarise the principles enumerated by this Court in the following manner:

25.1. Once the execution of the cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of the preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

25.4. That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

25.5. It is not necessary for the accused to come into the witness box to support his defence.

26. Applying the proposition of law as noted above, in the facts of the present case, it is clear that the signature on the cheque having been admitted, a presumption shall be raised under Section 139 that the cheque was issued in discharge of debt or liability. The question to be looked into is as to whether any probable defence was raised by the accused. In cross- examination of PW1, when the specific question was put that the cheque was issued in relation to a loan of Rs. 25,000 taken by the accused, PW1 said that he does not remember. PW1 in his evidence admitted that he retired in 1997 on which date he received a monetary benefit of Rs. 8 lakhs, which was encashed by the complainant. It was also brought in the evidence in the evidence that in the year 2010, the complainant entered into a sale agreement for which he paid an amount of Rs. 4,50,000 to Balana Gouda towards sale consideration. Payment of Rs. 4,50,000 being admitted in the year 2010 and a further payment of a loan of Rs. 50,000 with regard to which Complaint No.119 of 2012 was filed by the complainant, copy of which complaint was also filed as Ext. D-2, there was a burden on the complainant to prove his financial capacity. In the years 2010- 2011, as per the own case of the complainant, he made a payment of Rs. 18 lakhs. During his cross-examination, when the financial capacity to pay Rs. 6 lakhs to the accused was questioned, there was no satisfactory reply given by the complainant. The evidence on record, thus, is a probable defence on behalf of the accused, which shifted the burden on the complainant to prove his financial capacity and other facts."

15. In that light, it is contended that the very materials produced by the appellant and the answers relating to lack of knowledge of property details by PW-1 in his cross- examination would indicate that the transaction is doubtful and no evidence is tendered to indicate that the amount was paid. In such an event, it was not necessary for the respondent to tender rebuttal evidence but the case put forth would be sufficient to indicate that the respondent has successfully rebutted the presumption.

16. On the position of law, the provisions referred to in Sections 118 and 139 of N.I. Act as also the enunciation of law as made by this Court needs no reiteration as there is no ambiguity whatsoever. In, Basalingappa vs. Mudibasappa (supra) relied on by the learned counsel for the respondent, though on facts the ultimate conclusion therein was against raising presumption, the facts and circumstances are entirely different as the

transaction between the parties as claimed in the said case is peculiar to the facts of that case where the consideration claimed to have been paid did not find favour with the Court keeping in view the various transactions and extent of the amount involved. However, the legal position relating to presumption arising under Sections 118 and 139 of N.I. Act on a signature being admitted has been reiterated. Hence, whether there is a rebuttal or not would depend on the facts and circumstances of each case."

21. This position was reiterated in Tedhi Singh vs. Narayan DassMahant 2022 (6) SCC 735 wherein it was held:

"7. It is true that this is a case under Section 138 of the Negotiable Instruments Act. Section 139 of the N.I. Act provides that the Court shall presume that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability. This presumption, however, is expressly made subject to the position being proved to the contrary. In other words, it is open to the accused to establish that there is no consideration received. It is in the context of this provision that the theory of 'probable defence' has grown. In an earlier judgment, in fact, which has also been adverted to in Basalingappa (supra), this Court notes that Section 139 of the N.I. Act is an example of reverse onus [see (2010) 11 SCC 441). It is also true that this Court has found that the accused is not expected to discharge an unduly high standard of proof. It is accordingly that the principle has developed that all which the accused needs to establish is a probable defence. As to whether a probable defence has been established is a matter to be decided on the facts of each case on the conspectus of evidence and circumstances that exist."

22. Similar is the judgment in P. Rasiya v. Abdul Nazer, 2022 SCC OnLine SC 1131wherein it was observed:

"As per Section 139 of the N.I. Act, it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for discharge, in whole or in part, of any debt or other liability. Therefore, once the initial burden is discharged by the Complainant that the cheque was issued by the accused and the signature and the issuance of the cheque is not disputed by the accused, in that case, the onus will shift upon the accused to prove the contrary that the cheque was not for any debt or other liability. The presumption under Section 139 of the N.I. Act is a statutory presumption and thereafter, once it is presumed that the cheque is issued in whole or in part of any debt or other liability which is in favour of the Complainant/holder of the cheque, in that case, it is for the accused to prove the contrary."

23. This position was reiterated in Rajesh Jain v. Ajay Singh, (2023) 10 SCC 148: 2023 SCC OnLine SC 1275wherein it was observed at page 161:

33. The NI Act provides for two presumptions: Section 118 and Section 139. Section 118 of the Act inter alia directs that it shall be presumed until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the Act stipulates that "unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability". It will be seen that the "presumed fact" directly relates to one of the crucial ingredients necessary to sustain a conviction under Section 138. [The rules discussed hereinbelow are common to both the presumptions under Section 139 and Section 118 and are hence, not repeated - reference to one can be taken as reference to another]

34. Section 139 of the NI Act, which takes the form of a "shall presume" clause is illustrative of a presumption of law. Because Section 139 requires that the Court "shall presume" the fact stated therein, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. But this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary as is clear from the use of the phrase "unless the contrary is proved".

35. The Court will necessarily presume that the cheque had been issued towards the discharge of a legally enforceable debt/liability in two circumstances. Firstly, when the drawer of the cheque admits issuance/execution of the cheque and secondly, in the event where the complainant proves that the cheque was issued/executed in his favour by the drawer. The circumstances set out above form the fact(s) which bring about the activation of the presumptive clause. [Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal [Bharat Barrel & Drum Mfg. Co. v. Amin C hand Payrelal, (1999) 3 SCC 35]]

36. Recently, this Court has gone to the extent of holding that presumption takes effect even in a situation where the accused contends that a blank cheque leaf was voluntarily signed and handed over by him to the complainant. [Bir Singh v. Mukesh Kumar [Bir Singh v. Mukesh Kumar, (2019) 4 SCC 197: (2019) 2 SCC (Civ) 309: (2019) 2 SCC (Cri) 40]]. Therefore, the mere admission of the drawer's signature, without admitting the execution of the entire contents in the cheque, is now sufficient to trigger the presumption.

37. As soon as the complainant discharges the burden to prove that the instrument, say a cheque, was issued by the accused for discharge of debt, the presumptive device under Section 139 of the Act helps shifting the burden on the accused. The effect of the presumption, in that sense, is to transfer the evidential burden on the accused of proving that the cheque was not received by the Bank towards the discharge of any liability. Until this evidential burden is discharged by the accused, the presumed fact

will have to be taken to be true, without expecting the complainant to do anything further.

38. John Henry Wigmore [John Henry Wigmore and the Rules of Evidence: The Hidden Origins of Modern Law] on Evidence states as follows:

> "The peculiar effect of the presumption of law is merely to invoke a rule of law compelling the Jury to reach the conclusion in the absence of evidence to the contrary from the opponent but if the opponent does offer evidence to the contrary (sufficient to satisfy the Judge's requirement of some evidence), the presumption 'disappears as a rule of law and the case is in the Jury's hands free from any rule'."

39. The standard of proof to discharge this evidential burden is not as heavy as that usually seen in situations where the prosecution is required to prove the guilt of an accused. The accused is not expected to prove the nonexistence of the presumed fact beyond reasonable doubt. The accused must meet the standard of "preponderance of probabilities", similar to a defendant in a civil proceeding. [Ran gap pa v. Sri Mohan [Ran gappa v. Sri Mohan, (2010) 11 SCC 441: (2010) 4 SCC (Civ) 477: (2011) 1 SCC (Cri) 184: AIR 2010 SC 1898]]

24. Therefore, the Court has to start with the presumption that the cheque was issued in discharge of legal liability and the burden is upon the accused to prove the contrary.

25. The accused claimed that the cheque was issued as a security cheque at the time of taking the loan. He has not led any evidence to prove this fact. He has not even entered into the witness box to establish this fact.It was held in Sumeti Vij vs. Paramount Tech Fab Industries AIR 2021 SC 1281 that the accused has to lead defence evidence to rebut the presumption and mere denial in his statement under Section 313 is not sufficient to rebut the presumption. It was observed:

> "21. That apart, when the complainant exhibited all these documents in support of his complaints and recorded the statement of three witnesses in support thereof, the appellant recorded her statement under Section 313 of the Code but failed to record evidence to disprove or rebut the presumption in support of her defence available under Section 139 of the Act. The statement of the accused recorded under Section 313 of the Code is not substantive evidence of defence, but only an opportunity to the accused to explain the incriminating circumstances appearing in the prosecution case of the accused. Therefore, there is no evidence to rebut the presumption that the cheques were issued for consideration."
>
> (Emphasis supplied)"

26. The accused claimed that the cheque was issued as security. It was laid down by this Court in Hamid Mohammad Versus Jaimal Dass 2016 (1) HLJ 456, that even if the cheque was issued towards the security, the accused will be liable. It was observed:

> "9. Submission of learned Advocate appearing on behalf of the revisionist that cheque in question was issued to the complainant as security and on this ground, criminal revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. As per Section 138 of Negotiable Instruments Act 1881 if any cheque is issued on account of other liability then provisions of Section 138 of Negotiable Instruments Act 1881 would be attracted. The court has perused the original cheque Ext. C1 dated 30.10.2008 placed on record. There is no recital in cheque Ext. C-1 that cheque was issued as a security cheque. It is well-settled law that a cheque issued as security would also come under the provision of Section 138 of the Negotiable Instruments Act 1881. See 2016 (3) SCC page 1 titled Don Ayengia v. State of Assam & another. It is well- settled law that where there is a conflict between former law and subsequent law then subsequent law always prevails."

27. Hence, the plea taken by the accused that a blank signed cheque was issued at the time of taking the loan has not been proved. Even otherwise,it was laid down by this Court in Hamid Mohammad Versus Jaimal Dass 2016 (1) HLJ 456, that even if the cheque was issued towards the security, the accused will be liable. It was observed:

> "9. Submission of learned Advocate appearing on behalf of the revisionist that cheque in question was issued to the complainant as security and on this ground, criminal revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. As per Section 138 of Negotiable Instruments Act 1881 if any cheque is issued on account of other liability then provisions of Section 138 of Negotiable Instruments Act 1881 would be attracted. The court has perused the original cheque Ext. C1 dated 30.10.2008 placed on record. There is no recital in cheque Ext. C-1 that cheque was issued as a security cheque. It is well-settled law that a cheque issued as security would also come under the provision of Section 138 of the Negotiable Instruments Act 1881. See 2016 (3) SCC page 1 titled Don Ayengia v. State of Assam & another. It is well- settled law that where there is a conflict between former law and subsequent law then subsequent law always prevails."

28. It was laid down by the Hon'ble Supreme Court in Sam pelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Ltd., (2016) 10 SCC 458: (2017) 1 SCC (Cri) 149: (2017) 1 SCC (Civ) 126: 2016 SCC OnLine SC 954 that issuing a cheque toward security will also attract the liability for the commission of an offence punishable under Section 138 of N.I. Act. It was observed: -

"9. We have given due consideration to the submission advanced on behalf of the appellant as well as the observations of this Court in Indus Airways [Indus Airways (P) Ltd. v. Magnum Aviation (P) Ltd., (2014) 12 SCC 539: (2014) 5 SCC (Civ) 138: (2014) 6 SCC (Cri) 845] with reference to the explanation to Section 138 of the Act and the expression "for discharge of any debt or other liability" occurring in Section 138 of the Act. We are of the view that the question whether a post-dated cheque is for "discharge of debt or liability" depends on the nature of the transaction. If on the date of the cheque, liability or debt exists or the amount has become legally recoverable, the section is attracted and not otherwise.

10. Reference to the facts of the present case clearly shows that though the word "security" is used in Clause 3.1(iii) of the agreement, the said expression refers to the cheques being towards repayment of instalments. The repayment becomes due under the agreement, the moment the loan is advanced and the instalment falls due. It is undisputed that the loan was duly disbursed on 28-2-2002 which was prior to the date of the cheques. Once the loan was disbursed and instalments have fallen due on the date of the cheque as per the agreement, dishonour of such cheques would fall under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability.

11. The judgment in Indus Airways [Indus Airways (P) Ltd. v. Magnum Aviation (P) Ltd., (2014) 12 SCC 539: (2014) 5 SCC (Civ) 138: (2014) 6 SCC (Cri) 845] is clearly distinguishable. As already noted, it was held therein that liability arising out of a claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself on a par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of a cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in praesenti in terms of the loan agreement, as against Indus Airways [Indus Airways (P) Ltd. v. Magnum Aviation (P) Ltd., (2014) 12 SCC 539: (2014) 5 SCC (Civ) 138: (2014) 6 SCC (Cri) 845] where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of the present nature where the cheque was for repayment of loan instalment which had fallen due though such deposit of cheques towards repayment of instalments was also described as "security" in the loan agreement. In applying the judgment in Indus Airways [Indus Airways (P) Ltd. v. Magnum Aviation (P) Ltd., (2014) 12 SCC 539: (2014) 5 SCC (Civ) 138: (2014) 6 SCC (Cri) 845], one cannot lose sight of the

difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.

12. The crucial question to determine the applicability of Section 138 of the Act is whether the cheque represents the discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. While approving the views of the different High Courts noted earlier, this is the underlying principle as can be discerned from discussion of the said cases in the judgment of this Court."

29. This position was reiterated in Sripati Singh v. State of Jharkhand, 2021 SCC OnLine SC 1002: AIR 2021 SC 5732, and it was held that a cheque issued as security is not a waste paper and complaint under Section 138 of the N.I. Act can be filed on its dishonour. It was observed:

"17. A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. 'Security' in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of the amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if the same is dishonoured, the consequences contemplated under Section 138 and the other provisions of N.I. Act would flow.

18. When a cheque is issued and is treated as 'security' towards repayment of an amount with a time period being stipulated for repayment, all that it ensures is that such cheque which is issued as 'security cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque is issued as security. Further, the borrower would have the option of repaying the loan amount or such financial liability in any other form and in that manner, if the amount of loan due and payable has been discharged within the agreed period, the cheque issued as security cannot thereafter be presented. Therefore, the prior discharge of the loan or there being an altered situation due to which there would be an understanding between the parties is a sine qua non to not present the cheque which was issued as security. These are only the defences that would be available to the drawer of the cheque in proceedings initiated under Section 138 of the N.I.

> Act. Therefore, there cannot be a hard and fast rule that a cheque, which is issued as security can never be presented by the drawee of the cheque. If such is the understanding a cheque would also be reduced to an 'on-demand promissory note' and in all circumstances, it would only be civil litigation to recover the amount, which is not the intention of the statute. When a cheque is issued even though as 'security' the consequence flowing therefrom is also known to the drawer of the cheque and in the circumstance stated above if the cheque is presented and dishonoured, the holder of the cheque/drawee would have the option of initiating the civil proceedings for recovery or the criminal proceedings for punishment in the fact situation, but in any event, it is not for the drawer of the cheque to dictate terms with regard to the nature of litigation."

30. In the present case, the document(Mark "DX") filed by the accused shows the liability of ¹ 1,17,000/- on the date of issuance of the cheque, therefore, even if the cheque was issued as a security, the accused cannot escape from his liability.

31. It was submitted that there is a difference in the handwriting of the cheque, which shows that the cheque was filled by some other person. This submission will not help the accused. It was laid down by the Hon'ble Supreme Court in Bir Singh v. Mukesh Kumar, (2019) 4 SCC 197: (2019) 2 SCC (Cri) 40: (2019) 2 SCC (Civ) 309: 2019 SCC OnLine SC 138, that a person is liable for the commission of an offence punishable under Section 138 of the Negotiable Instruments Act even if the cheque is filled by some other person. It was observed:

> "33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.
>
> 34. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.
>
> 35. It is not the case of the respondent accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under

Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.

36. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."

32. This position was reiterated in Oriental Bank of Commerce v. Prabodh Kumar Tewari, 2022 SCC OnLine SC 1089 wherein it was observed:

"12. The submission which has been urged on behalf of the appellant is that even assuming, as the first respondent submits, that the details in the cheque were not filled in by the drawer, this would not make any difference to the liability of the drawer.

xxxxxx

16. A drawer who signs a cheque and hands it over to the payee, is presumed to be liable unless the drawer adduces evidence to rebut the presumption that the cheque has been issued towards payment of a debt or in the discharge of a liability. The presumption arises under Section 139"

33. Therefore, the cheque is not bad even if it is not filled by the drawer.

34. The learned Trial Court has rightly held that once the signatures were not disputed, the presumption under Section 139 of N.I.Act would be attracted and the burden will shift upon the accused to rebut the presumption. It was laid down by the Hon'ble Supreme Court in Rohitbhai Jivanlal Patel v. State of Gujarat (2019) 18 SCC 106 that once a presumption has been drawn the onus shifts to the accused. The Court cannot raise any doubt on the complainant's case in view of the presumption. It was observed: -

"18. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the trial court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the trial court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the appellant-accused. The aspect relevant for consideration had been as to

whether the appellant- accused has brought on record such facts/material/ circumstances which could be of a reasonably probable defence."

35. It was laid down by the Hon'ble Supreme Court in Uttam Ram Versus Devinder Singh Hudan and another (2019) 10 SCC 287 that the complainant is not to prove the debt as in a civil court because of the presumption but only to prove that the cheque was issued by the accused. It was observed:-

"20. The Trial Court and the High Court proceeded as if, the appellant is to prove a debt before a civil court wherein, the plaintiff is required to prove his claim on the basis of evidence to be laid in support of his claim for the recovery of the amount due. Dishonour of a cheque carries a statutory presumption of consideration. The holder of the cheque in due course is required to prove that the cheque was issued by the accused and that when the same was presented, it was not honoured. Since there is a statutory presumption of consideration, the burden is on the accused to rebut the presumption that the cheque was issued not for any debt or other liability."

36. It was laid down in P. Rasiya v. Abdul Nazer, 2022 SCC OnLine SC 1131 that the complainant is not to state the nature of the transaction or the source of funds. It was observed:-

"By the impugned common judgment and order, the High Court has reversed the concurrent findings recorded by both the courts below and has acquitted the accused on the ground that, in the complaint, the Complainant has not specifically stated the nature of transactions and the source of fund. However, the High Court has failed to note the presumption under Section 139 of the N.I. Act. As per Section 139 of the N.I. Act, it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for discharge, in whole or in part, of any debt or other liability. Therefore, once the initial burden is discharged by the Complainant that the cheque was issued by the accused and the signature and the issuance of the cheque are not disputed by the accused, in that case, the onus will shift upon the accused to prove the contrary that the cheque was not for any debt or other liability. The presumption under Section 139 of the N.I. Act is a statutory presumption and thereafter, once it is presumed that the cheque is issued in whole or in part of any debt or other liability which is in favour of the Complainant/holder of the cheque, in that case, it is for the accused to prove the contrary. The aforesaid has not been dealt with and considered by the High Court."

37. Therefore, in view of the binding precedents of the Hon'ble Supreme Court, the complainant is not required to prove the existence of legally enforceable debt or liability as this is a matter of presumption. Rather, the accused is required to disprove the existence of legally enforceable debt or liability.

38. In the present case, the accused did not lead any evidence to rebut the presumption rather he filed the statement of account, which establishes his liability; therefore, the learned Courts below had rightly held that the accused failed to discharge the burden placed upon him.

39. The accused did not dispute that the cheque was dishonoured due to insufficient funds. The accused also did not dispute that notice was received by him. He claimed that he had paid some of the amount after receipt of the notice and filed a statement of account (Mark 'DX') to establish this fact; therefore, the learned Courts below had rightly held that all the ingredients of Section 138 of N.I. Act were established in the present case and learned Trial Court had rightly convicted and sentenced the accused.

40. It was laid down by the Hon'ble Supreme Court in Bir Singh vs. Mukesh Kumar 2019 (4) SCC 197 that the penal provision of Section 138 is a deterrent in nature. It was observed:-

> "9. The object of Section 138 of the Negotiable Instruments Act is to infuse credibility into negotiable instruments including cheques and to encourage and promote the use of negotiable instruments including cheques in financial transactions. The penal provision of Section 138 of the Negotiable Instruments Act is intended to be a deterrent to the callous issuance of negotiable instruments such as cheques without serious intention to honour the promise implicit in the issuance of the same."

41. In view of this consideration, the sentence of one year is not excessive.

42. The learned Trial Court awarded compensation of Rs. 2,00,000/-. It was submitted that the amount deposited by the complainant was not considered by the learned Trial Court. The statement of account filed by the accused shows that the amount of ¹ 1,57,219/-on 31.03.2021.

43. The complainant had to engage a counsel and had to incur the legal fee. It was laid down by the Hon'ble Supreme Court in M/S Kalamani Tex and another Versus P. Balasubramanian JT 2021(2) SC 519 that the Courts should uniformly levy a fine up to twice the cheque amount along with simple interest at the rate of 9% per annum. It was observed:-

> "20. As regards the claim of compensation raised on behalf of the respondent, we are conscious of the settled principles that the object of Chapter XVII of the NIA is not only punitive but also compensatory and restitutive. The provisions of NIA envision a single window for criminal liability for the dishonour of a cheque as well as civil liability for the realisation of the cheque amount. It is also well settled that there needs to be a consistent approach towards awarding compensation and unless there exist special circumstances, the Courts should uniformly levy a fine up to twice the cheque

amount along with simple interest at the rate of 9% per annum. [R. Vijian v. Baby, (2012) 1 SCC 260, 20]"

44. Hence, the amount of compensation of Rs. 2,00,000/- cannot be said to be excessive and no interference is required with the judgments and order of sentence passed by the learned Courts below.

45. No other point was urged.

46. In view of the above, the present petition fails and the same is dismissed. Records of the learned Courts below be sent back forthwith.

2024(2)GDCJ606

PUNJAB AND HARYANA HIGH COURT

[Before Manjari Nehru Kaul]

Crm-M-(Criminal Main) No 24345 of 2024 **dated 01/08/2024**

Rajveer Singh Samra and Another

Versus

Central Bureau of Investigation

ANTICIPATORY BAIL REJECTION

Indian Penal Code, 1860 Sec. 420, Sec. 403, Sec. 120B, Sec. 406 - Code of Criminal Procedure, 1973 Sec. 438, Sec. 164 - Negotiable Instruments Act, 1881 Sec. 138 - Prevention of Corruption Act, 1988 Sec. 13 - Anticipatory Bail Rejection - Petitioners sought anticipatory bail in a fraud case involving over Rs. 48 crores - Petitioners were accused of conspiring to fraudulently dispose of hypothecated stocks without repaying loans to Punjab National Bank - Court found substantial evidence of their involvement, including statements under Sec. 164 CrPC - Given the gravity of allegations and potential economic harm, anticipatory bail denied - Petition Dismissed

Law Point: Anticipatory bail in cases of large-scale financial fraud involving economic harm is not granted when substantial prima facie evidence implicates the accused.

ભારતીય દંડ સંહિતા, 1860 કલમ 420, કલમ 403, કલમ 120બી, કલમ 406 - ફોજદારી કાર્યરીતિ સંહિતા, 1973 કલમ 438, કલમ 164 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 કલમ 138 - ભ્રષ્ટાચાર નિવારણ અધિનિયમ, 1988 કલમ 13 - આગોતરા જામીન નામંજૂર - 48 કરોડ રૂપિયાથી વધુની છેતરપિંડીના કેસમાં અરજદારોએ આગોતરા જામીન માંગ્યા હતા - અરજદારો પર પંજાબ નેશનલ બેંકને લોન ચૂકવ્યા વિના અનુમાનિત જથ્થાનો છેતરપિંડીથી નિકાલ કરવાનું કાવતરું ઘડવાનો આરોપ મૂકવામાં આવ્યો હતો - કોર્ટને તેમની સંડોવણીના

નોંધપાત્ર પુરાવા મળ્યા જેમાં કલમ 164 ક્રિમિનલ પ્રોસિજર કોડ હેઠળના નિવેદનોનો પણ સમાવેશ થાય છે - આરોપોની ગંભીરતા અને સંભવિત આર્થિક નુકસાનને ધ્યાનમાં રાખીને આગોતરા જામીન નામંજૂર કરવામાં આવ્યા - અરજી નામંજૂર

કાયદાનો મુદ્દો: જ્યારે નોંધપાત્ર પ્રથમદર્શી પુરાવા આરોપીને સંડોવતા હોય તેવા આર્થિક નુકસાન સાથે સંકળાયેલા મોટા પાયે નાણાકીય છેતરપિંડીના કેસોમાં આગોતરા જામીન મંજૂર કરવામાં આવતાં નથી

Acts Referred:

Indian Penal Code, 1860 Sec. 420, Sec. 403, Sec. 120B, Sec. 406
Code of Criminal Procedure, 1973 Sec. 438, Sec. 164
Negotiable Instruments Act, 1881 Sec. 138
Prevention of Corruption Act, 1988 Sec. 13

Counsel:

R S Rai (Senior Advocate), Anurag Arora, Ravi Kamal Gupta

JUDGEMENT

Manjari Nehru Kaul, J.- [1] The petitioners are seeking the concession of bail under Section 438 of the Cr.P.C. in case FIR No.RC0052020A0011 dated 08.07.2020 under Sections 420, 406, 403, 120-B of the IPC and Sections 13(1)(d), 13(2) of the Prevention of Corruption Act, 1988 registered at Police Station ACB, Chandigarh.

[2] On the last date of hearing, the learned Senior counsel for the petitioners had made the following submissions:-

"Learned senior counsel for the petitioners inter alia submits that the allegations regarding loan pertained exclusively to M/s GAPL. Petitioner Rajveer Singh was never a director of M/s GAPL, and petitioner Sukhveer Singh, although a former director, ceased to be one in June, 2014. Notably, the loan in question was approved for M/s GAPL in December, 2015. Both the petitioners were solely guarantors for a certain property hypothecated to the bank, and they had no further role in the loan transaction. It has been further submitted that both the petitioners had duly joined investigation and cooperated with the investigating agency as and when summoned. Attention of this Court has also been drawn to the replies filed by the CBI (Annexures P-10 and P-11) in response to the bail applications of the petitioners before the learned Trial Court. It has been submitted that these replies clearly indicate that the CBI did not arrest the petitioners during the investigation, underscoring that their custodial interrogation had never been sought and not even required. Additionally, it has been urged that the only other allegation against petitioner Sukhveer Singh concerns a stock statement allegedly signed by him; however, to date, no FSL report has confirmed the authenticity of his

signatures on this statement. Learned senior counsel has still further argued that, as guarantors, even as per the case of the CBI, prima facie offences under Sections 420, 406 of the IPC are not even made out against the petitioners. There are no allegations of forgery against either of the petitioners, and the categoric stand of the CBI implicates them solely based on the strength of an offence under Section 120B of the IPC which position is also substantiated by the reply of the CBI dated 27.05.2024. (page 26) Lastly, it has been submitted by learned senior counsel for the petitioners that the three FIRs have been lodged against the petitioners for the same cause of action, which constitutes a clear abuse of the legal process. Moreover, one of these FIRs was quashed by a Division Bench of this Court vide order dated 27.05.2024."

[3] In addition, learned Senior Counsel for the petitioners submits that the CBI has misused its powers by registering the present FIR dated 08.07.2020 based on a complaint by the Punjab National Bank (hereinafter referred to as 'PNB'). This FIR is the third instance of an FIR being registered for the same cause of action, following two previous FIRs filed by the Punjab Police and the CBI; this third FIR was lodged solely to harass them.

[4] It has been submitted that as per allegations levelled, co-accused M/s Golden Agrarian Pvt. Ltd. (hereinafter referred to as 'GAPL') secured a loan in the form of cash credit and term loan during the year 2015-2016 using stock and securities as collateral. Another co-accused M/s Star Agri Warehousing and Collateral Management Limited (hereinafter referred to as the M/s Star Agri) was appointed as the Collateral Manager for the warehoused goods, with separate stock auditors appointed for verification. The account of GAPL was classified as non-performing asset (NPA) on 31.03.2018. During a physical verification of stocks, it was discovered that the hypothecated stocks had been clandestinely disposed off by the Directors of GAPL and other co-accused, including the petitioners, in collusion with employees of M/s Star Agri, who were purportedly responsible for the custody of the stocks. Consequently, on 10.01.2023, a challan was presented against the petitioners under various sections of the Indian Penal Code, and against co-accused-Dev Raj Dutta under additional Sections of the Prevention of Corruption Act, 1988. However, prosecution sanction for Dev Raj Dutta was declined by the competent Authority in July, 2023.

[5] It has been vehemently asserted that the sequence of events leading to the registration of the present FIR indicates a blatant abuse of the legal process. On 12.09.2019, FIR no.195 was registered by the Punjab Police based on a complaint made by Pramod Kumar, who was State Head of M/s Star Agri, wherein similar allegations were made against the petitioners. They were accused of releasing a substantial portion of the pledged stocks without repaying the corresponding loan amount to PNB. The petitioners were granted the concession of anticipatory bail by the learned Additional Sessions Judge on 12.12.2019, who in his order noted that there

was no evidence suggesting that the petitioners had misappropriated the stocks as the custody of the stocks had always remained with M/s Star Agri. However, on 30.06.2020, another FIR was registered by the CBI, with respect to allegations of misappropriation of pledged stocks which were in the custody of M/s Star Agri. Despite this, the petitioners were granted the concession of bail on 23.01.2023 by the learned Special Judge, CBI, SAS Nagar, Mohali. While granting the concession of bail, the Court categorically observed that the petitioners had fully cooperated with the investigation and posed no flight risk.

[6] Learned Senior counsel has still further asserted with vehemence that it is evident from the circumstances that the registration of three different FIRs for the same cause of action clearly constitutes a gross abuse of the legal process. In both the earlier FIRs, the petitioners had not only joined investigation and cooperated fully with the investigating agency but had also been granted anticipatory bail by the concerned Courts. Similarly, in the present FIR, the petitioners have joined investigation, cooperated throughout, and also provided all the requisite documentary evidence to the CBI. In support, learned Senior counsel has also drawn the attention of this Court to the reply filed by the CBI, annexed as Annexures P-8 and P-9. It has still further been contended that the investigation in the present case is complete, and it is on record, as is evident from the replies filed by the CBI (Annexures P-8 and P-9) that the petitioners were neither arrested during investigation nor was their custodial interrogation sought by the CBI hence, given that they had fully cooperated, they are entitled to the concession of anticipatory bail; there is also no apprehension of the petitioners tampering with evidence or fleeing during the trial. In support of his submissions, learned senior counsel has placed reliance upon Mahdoom Bava vs. Central Bureau of Investigation,2023 Live Law(SC) 218, Tarsem Lal vs. Directorate of Enforcement, Jalandhar Zonal Office, Criminal Appeal No.2608 of 2024, **Sushila Aggarwal and others vs. State (NCT of Delhi) and another**, 2020 5 SCC 1.

[7] Per contra, learned Standing counsel for the CBI, while vehemently opposing the prayer and submissions made by the counsel opposite, has argued that both the petitioners as Directors of Amyra Foods Pvt. Ltd. masterminded an elaborate plan to obtain loans from PNB based on hypothecated goods, which they then clandestinely disposed off, before the loan amount could even be repaid, causing a huge loss to PNB, amounting to over Rs.48 crores.

[8] Learned Standing counsel for the CBI has further elaborated that this fraudulent plan involved collusion with officials of M/s Star Agri, who were responsible for ensuring the safe custody of the hypothecated goods. These officials fabricated stock registers and submitted false audit reports at the behest of petitioner No.1-Rajveer Singh in exchange for financial gains. Furthermore, the warehouse Supervisor co-accused Ram Kumar, corroborated these allegations in his statement made under Section 164 of Cr.P.C., categorically stating that he had issued false

registers under the directions of the co-accused Pramod Kumar, State Head of M/s Star Agri, and that all stock receipts were issued by the petitioners without the actual stocks being in existence.

[9] While placing reliance upon the decision of Hon'ble the Supreme Court in Sushila Aggarwal's case (supra), learned Standing counsel for the CBI has argued that while considering an application for the grant of anticipatory bail, the Court must consider the likelihood of the accused indulging in similar offences in case his application for anticipatory bail is allowed. He has further submitted that the petitioners had repeatedly been involved in economic offences which was evident as two more FIRs had been registered against them for committing similar offences. Learned Standing counsel for CBI has further disputed the submissions made by the learned senior counsel opposite that the other two FIRs registered against the petitioners were for the same cause of action; he submits that other two FIRs were not registered on the same cause of action rather the loan amount, lending Banks as well as the companies involved were different, and only the Directors of the Company i.e. the petitioners, were common in all the 3 cases. Furthermore, several banks which had been defrauded by the petitioner had initiated DRT proceedings against the petitioners wherein the application filed by the said banks for recovery of different amounts totalling about Rs.60 crores had been allowed and the orders had since attained finality. In support, learned counsel has invited the attention of this Court to the orders dated 7.11.2019 and 05.10.219 passed by Presiding Officer, DRT-I Chandigarh. It has also been brought to the notice of this Court that in a case registered under the Negotiable Instruments Act, petitioner No.2, Sukhveer Singh Samra, has been declared a proclaimed offender and thus, on this ground also he would not be entitled to the grant of anticipatory bail.

[10] Learned Standing counsel for CBI has, thus, argued vehemently that the fraud and embezzlement perpetuated by the accused, including the petitioners, caused huge financial losses to PNB, which without doubt were hazardous to the economic health of the country and thus precluded them from being extended the extraordinary concession of anticipatory bail.

[11] I have heard learned counsel for the parties and perused the relevant material on record.

[12] When deciding an application for anticipatory bail, particularly in cases involving economic offences and of substantial magnitude, a Court must meticulously consider not only the gravity and potential societal impact of the allegations detailed in the FIR but also the broad implications in case anticipatory bail is granted. It is, therefore, essential to thoroughly understand the nature and gravity of the allegations and the precise role of the accused in the alleged offences. Furthermore, the Court is also expected to scrutinise the antecedents of the accused. The risk of the accused fleeing from justice must also be assessed.

[13] In **Sushila Aggarwal's** case (supra), Hon'ble the Supreme Court emphasised upon the principles governing the grant of anticipatory bail. Hon'ble the Supreme Court while highlighting the importance of evaluating the nature and gravity of the alleged offences, the specific role attributed to the accused and the unique facts of the case held that the decision in a petition for anticipatory bail has to be tailored to the particular circumstance of each case.

[14] In Satender Kumar Antil vs. Central Bureau of Investigation and another,2022 LiveLaw(SC) 577, the Hon'ble Supreme Court further dealt into the considerations necessary for granting anticipatory bail in cases involving economic offences emphasising the nuanced approach required. The Hon'ble Supreme Court observed that economic offences have the potential to severely undermine the financial stability of the country, causing widespread and profound harm to the nation's economic health.

[15] The petitioners herein have asserted their entitlement to bail on the grounds that the investigating agency did not seek their custodial interrogation during investigation. This assertion, in the considered opinion of this Court, is fundamentally flawed when used as a basis for anticipatory bail. Hon'ble the Supreme Court in **Sumitha Pradeep vs. Arun Kumar C.K. & another, Criminal Appeal No.1834 of 2022,** held that it was imperative to clarify the prevalent legal misconception regarding anticipatory bail; the necessity for custodial interrogation of the accused should not be the sole criterion for either granting or denying the anticipatory bail. Hon'ble the Apex Court further observed that while custodial interrogation is a significant factor, it must be assessed in conjunction with the other relevant consideration while deciding a prayer for anticipatory bail. There could be numerous scenarios where custodial interrogation may not be required. However, this did not imply that the prima facie case against the accused should be disregarded, nor should it result in the automatic granting of anticipatory bail. It was still further held by the Hon'ble Supreme Court that the Court should examine the nature of the offence and the severity of the potential punishment. The Hon'ble Supreme Court went on to categorically hold that although the need for custodial interrogation could be a valid basis for denying an anticipatory bail, the absence of such a need would not, in itself, justify the grant of bail, even if the investigating agency did not require the custodial interrogation of an accused. Hence, in the wake of the categoric observations made in **Sumitha Pradeep's case (supra)**, the presence or absence of a requirement for custodial interrogation cannot be the decisive factor while deciding a petition for anticipatory bail.

[16] Adverting to the case in hand, the investigation has ostensibly revealed a criminal conspiracy orchestrated by the Directors of GAPL, Harjinder Singh (father of the petitioners and since expired) and Malkiat Singh, who applied for a loan from PNB, with the petitioners Rajveer Singh and Sukhveer Singh, Directors of Amyra

Foods Pvt. Ltd., standing as guarantors. The allegations prima facie indicate that in connivance with co-accused Pramod Kumar, State Head of M/s Star Agri, the petitioners dishonestly and fraudulently disposed off the stocks hypothecated with PNB, without repaying the loan, which had been obtained by the Company.

[17] Furthermore, it would also be relevant to notice that the alleged active involvement of the petitioners is further elucidated in the statement recorded under Section 164 of Cr.P.C. by accused Ram Kumar who was at the relevant time Warehouse Supervisor-cum-Watchman of M/s Star Agri. In his statement under Section 164 of Cr.P.C., he disclosed that he had made false entries in the Master Stock Registers (MSR) and issued Commodity Inward Sheet (CIS) from 11.4.2017 onwards, with the petitioners' signing as depositors on some of the CIS. Additionally, to disguise the absence of actual stocks, stacks of wooden crates were allegedly inspected in the presence of the petitioners and the other co-accused. In addition, allegedly the petitioners, in connivance with the co-accused, obtained false stock registers from the Warehouse Supervisor-cum-Watchman, co-accused Ram Kumar, without the actual stocks being in possession.

[18] It would also not be out of place to mention here that there are criminal cases pending against the petitioners involving similar allegations; furthermore this Court has also been apprised by the learned Standing counsel for CBI, in a complaint case under Section 138 of Negotiable Instruments Act, petitioner no.2 has been declared a proclaimed person.

[19] Given the gravity of the allegations and substantial prima facie evidence implicating the petitioners in a fraud resulting in financial losses exceeding Rs. 48 crores to the PNB and significant personal gains, the severity of the offences alleged cannot be ignored. The potential impact on the country's economic health necessitates a careful and thorough adjudication of the prayer made in the instant petition. Thus, considering the alleged roles of the petitioners, and following a prudent and cautious approach, this Court does not deem it fit to extend the extraordinary concession of anticipatory bail to the petitioners.

[20] Accordingly, the instant petition is dismissed. However, it is made clear that anything observed hereinabove shall not be construed to be an expression of opinion on the merits of the case

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