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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.M.C. 3937/2012 and Crl. M.A. No. 18900/2012 (for stay)**

KRISHNA MURARI LAL Petitioner
Through Mr. U. Hazarika, Sr. Advocate with
Mr. Raka B. Phookan, Ms. Neha
Tandon and Mr. Paul Paske, Advs.

versus

IFCI FACTORS LTD Respondent
Through Ms. Anjali Sharma, Advocate

AND

+ **CRL.M.C. 3935/2012 and Crl. M.A. No. 18896/2012 (for stay)**

BIMAL KUMAR JHUNJHUNWALA Petitioner
Through Mr. U. Hazarika, Sr. Advocate with
Mr. Raka B. Phookan, Ms. Neha
Tandon and Mr. Paul Paske, Advs.

versus

IFCI FACTORS LTD & ORS Respondents
Through Ms. Anjali Sharma, Advocate for
Respondent no. 1

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Date of Decision: 27th November, 2012

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J (ORAL):

1. Present petitions have been filed by the petitioners under Section 482 of the Code of Criminal Procedure (for short 'Cr. P.C.')
2. Mr. U. Hazarika, learned senior counsel for the petitioners states that the petitioners are independent and non-executive Directors of the Company in question and are not responsible for its day to day affairs. In this connection, he relies upon a judgment of the Supreme Court in the case of ***K.K. Ahuja vs. V.K. Vora and Anr., (2009) 10 SCC 48.***
3. Mr. Hazarika further submits that before passing the impugned summoning order, the trial court has not complied with the mandatory requirement prescribed in Section 202 Cr. P.C. The relevant portion of Section 202 Cr. P.C. is reproduced hereinbelow:-

"202. Postponement of issue of process:-

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

4. In support of his proposition, Mr. Hazarika relies upon a judgment of the Supreme Court in the case of ***K.T. Joseph vs. State of Kerala and Anr., (2009) 15 SCC 199*** wherein it has been held as under:-

“2. Learned Single Judge has observed that after the amendment to Section 202 of the Code of Criminal Procedure, 1973 (in short “the Code”) with effect from 23-6-2006 by Central Act 25 of 2005 it is mandatory on the part of the learned Magistrate to conduct an enquiry under Section 202 of the Code. Learned Single Judge noted that the Magistrate had emphasized that he was considering the complaint at the pre-cognizance stage which according to him was not correct. By deciding to examine the complainant and the witnesses under Section 202 of the Code, the Magistrate had already taken cognizance of the offence and he was not considering the sworn statements of the witnesses at the pre-cognizance stage. Learned Single Judge felt that enquiry was mandatory after 23-6-2006.

3. The legal position is unexceptionable.....”

5. This Court upon a perusal of the complaint filed by the respondent/complainant finds that there are specific allegations against the

present petitioners. The relevant portion of the complaint filed under Section 138 read with Section 141 of the Negotiable Instruments Act is reproduced hereinbelow:-

“2. The accused no.1 is a company incorporated under the Companies Act, 1956 with its registered office at West Bengal. Accused Nos. 2 and 6 are directors on the board of the accused no.1 concern, and are in charge of and responsible for the conduct of the day to day business and financial decision making of the accused No.1 Company.”

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“9. The accused nos. 2 to 6, being the directors on the board of the accused no.1, and responsible for the day to day functioning and financial decision making of the accused Company, formed the intention to issue the above mentioned cheques in favour of the complainant, knowing fully well that they were not possessed of adequate balance, and that the complainant would not therefore be able to recover the amounts payable against the cheques. They are thus also liable to be punished along with the accused No.1 for the offence contemplated under Section 138 read with Section 141 of the Negotiable Instruments Act.”

6. Further, the Supreme Court in **K.K. Ahuja (supra)** has held as under:-

“24. Therefore, the averment in a complaint that an accused is a Director and that he is in charge of and is responsible to the company for the conduct of the business of the company, duly affirmed in the sworn statement, may be sufficient for the purpose of issuing summons to him.....”

7. Keeping in view the aforesaid judgment, this Court is of the opinion that at this stage, the averments in the complaint are sufficient for the purpose of summoning the petitioners. It shall, however, be open to the petitioners to lead evidence before the trial court to show that they are neither whole-time Directors of the Company in question nor involved in its

day-to-day management.

8. Undoubtedly, Section 202 Cr. P.C. stipulates that either an enquiry by a Magistrate or an investigation is mandatory in cases where the accused is residing beyond the territorial jurisdiction of the concerned Court. However, the outline of scope of enquiry to be conducted by the Magistrate can be found in Sub-section (2) of Section 202 Cr. P.C. wherein it has been stated that a Magistrate may if he thinks fit, take evidence of witnesses on oath provided it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions, he shall call upon the complainant to produce all his witness and examine them on oath.

9. In the present case, the summoning order dated 2nd July, 2012 states as under:-

“Heard.

On the basis of the complainant and the original documents annexed with the complaint, cognizance is taken.

Pre-summoning evidence of CW1 led by way of affidavit.

PSE closed.

Arguments on summoning heard.

Material perused.

Sufficient material found on record to summon the accused u/s 138 NI Act. Let accused be summoned u/s 138 NI Act on filing of PF/RC/Speed Post for 31.08.2012.”

(emphasis supplied)

10. From the aforesaid order, it is apparent that not only has the complainant led evidence but the Magistrate prior to issuance of summons has perused all the documents and heard arguments. Consequently, this Court is of the view that the Magistrate in the present case has conducted an enquiry prior to issuance of summons as envisaged by Section 202 Cr. P.C.

11. This Court is also of the view that the Supreme Court in the case of ***K.T. Joseph (supra)*** upheld the order of the learned Single Judge setting aside the summoning order as in that case, the Magistrate had specifically stated that he was not considering the sworn statements of the witnesses at the pre-cognizance stage.

12. Consequently, this Court sees no merit in the present petitions.

13. However, as this Court has been informed that Mr. Krishna Murari Lal, petitioner in Crl. M.C. No. 3937/2012, is 72 years old retired IAS Officer, this Court grants him exemption from personal appearance before the trial court subject to his appearing through counsel provided his counsel does not dispute the identity of the accused and does not seek any adjournment in the trial court proceedings.

14. With the aforesaid observations, the present petitions and pending applications stand disposed of.

MANMOHAN, J

NOVEMBER 27, 2012
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