

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

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Reserved on : 22nd August, 2013
Date of decision : 1st November, 2013

+ CRL.M.C. 3669/2011

VIJAY GHAI & ANR

..... Petitioners

Through : Ms. Arundhati Katju, Mr.
Sidharth Joshi, Ms. Prerna
and Ms. Gunjan Chawla,
Advs.

versus

PAL SINGH KARTAR SINGH

..... Respondent

Through : None.

+ CRL.M.C. 602/2012

VIJAY GHAI

..... Petitioner

Through : Ms. Arundhati Katju, Mr.
Sidharth Joshi, Ms. Prerna
and Ms. Gunjan Chawla,
Advs.

versus

STATE & ANR

..... Respondents

Through : Ms. Ritu Gauba, APP.

+ CRL.M.C. 603/2012

MOHIT GHAI

..... Petitioner

Through : Ms. Arundhati Katju, Mr.
Sidharth Joshi, Ms. Prerna
and Ms. Gunjan Chawla,
Advs.

versus

STATE & ANR Respondents
Through : Ms. Ritu Gauba, APP.

+ **CRL.M.C. 604/2012**

VIJAY GHAI Petitioner
Through : Ms. Arundhati Katju, Mr.
Sidharth Joshi, Ms. Perna
and Ms. Gunjan Chawla,
Advs.

versus

STATE & ANR Respondents
Through : Ms. Ritu Gauba, APP.
Mr. Neeraj Gupta, Adv. for
R-2.

+ **CRL.M.C. 606/2012**

MOHIT GHAI Petitioner
Through : Ms. Arundhati Katju, Mr.
Sidharth Joshi, Ms. Perna
and Ms. Gunjan Chawla,
Advs.

versus

STATE & ANR Respondents
Through : Ms. Ritu Gauba, APP.

**CORAM :-
HON'BLE MR. JUSTICE J.R. MIDHA**

JUDGMENT

J.R. Midha, J.

1. The petitioners have challenged three summoning orders passed by the learned Magistrate in three separate complaints under Section 138 of the Negotiable Instruments Act.

Brief facts

CRL.M.C.Nos.603-04/2012

2. The petitioner appointed respondent no.2 as its franchisee to sell its products on commission basis vide agreement dated 4th September, 2006. The franchisee business came to an end with effect from 14th July, 2010 when the parties settled their disputes amicably vide Memorandum of Understanding dated 14th July, 2010 and the petitioner paid Rs.5,00,000/- to the respondent in full and final settlement vide post-dated cheque no.020030 dated 19th February, 2011 drawn on ICICI Bank, Ludhiana which was deposited by respondent no.2 in State Bank of India, Saraswati Vihar, Delhi and was dishonoured due to insufficient funds. Respondent no.2 issued a notice dated 8th April, 2011 to the petitioner by registered A.D. post duly received by the petitioners who chose not to reply. Respondent no.2 instituted a complaint under Section 138 of the Negotiable Instruments Act before the ACMM, Rohini Courts, Delhi. Respondent no.2 filed the evidence by way of his affidavit as Ex.PW1/A in which he proved the memorandum of understanding dated 14th July, 2010 as Ex.CW1/2, cheque, return memo and notice of dishonor and postal receipts as Ex.CW1/3 to Ex.CW1/22. The learned Metropolitan Magistrate

considered the said evidence and issued the summons to the petitioners.

Crl.M.C.No.3669/2011

3. Respondent supplied the fabric to the petitioners in terms of order placed by them time to time and in discharge of said liability, the petitioners issued cheques No. 139711 dated 21st September, 2010 and No.139712 dated 27th August, 2010, both drawn on Allahabad Bank, Ludhiana, which were deposited by respondent in Bank of Baroda, Chandni Chowk and were dishonoured upon presentation due to insufficient funds. Respondent issued a notice dated 23rd October, 2010 by registered A.D. post as well as UPC. Despite service of said notice registered A.D. post as well as UPC, the petitioners chose not to reply to the notice. Respondent instituted the complaint under Section 138 of Negotiable Instruments Act and led the evidence by way of affidavit as Ex. CW-1/A in which he proved the invoices and bills as Exs. CW-1/1 to CW-1/29, cheques, return memo, notice and postal receipts/A.D. cards as CW-1/30 to CW-1/41. The learned Metropolitan Magistrate considered the evidence of the respondent and issued the summon to the petitioners.

CRL.M.C.Nos.602/2012 and 606/2012

4. Respondent no.2 supplied the fabric to the petitioners in terms of the order placed by them from time to time and in discharge of the said liability, the petitioners issued cheque No.139095 dated 27th December, 2009 drawn on Allahabad Bank,

Ludhiana which was deposited by respondent no.2 in Bank of Baroda, Chandni Chowk and was dishonoured upon presentation due to insufficient funds. Respondent no.2 issued a notice dated 10th June, 2010 by registered A.D. post as well as UPC. Despite service of the said notice by registered A.D. post as well as UPC, the petitioners chose not to reply to the notice. Respondent no.2 instituted the complaint under Section 138 of the Negotiable Instruments Act and led the evidence by way of affidavit as Ex.PW1/A in which he proved the invoices in support of the fabric supplied to the petitioners as Ex.CW1/1 to Ex.CW1/7, cheque, return memo, notice of dishonor and the postal receipts/A.D. cards as Ex.CW1/8 to Ex.CW1/17. The learned Metropolitan Magistrate considered the evidence of respondent no.2 and issued the summons to the petitioners.

5. The petitioners have challenged the summoning orders on two grounds. The first ground of challenge is that the Delhi Court does not have the territorial jurisdiction as the petitioners are residing at Ludhiana and the cheques in question were also drawn on the Bank at Ludhiana. The second ground of challenge is that the learned Metropolitan Magistrate has not conducted any inquiry or investigation in terms of Section 202 Cr.P.C.

Territorial Jurisdiction

6. The law with respect to the territorial jurisdiction of the Court under Section 138 of the Negotiable Instruments Act has been set at rest by the Supreme Court in *Nishant Aggarwal v.*

Kailash Kumar Sharma, 2012 (7) SCALE 753 in which the Supreme Court, after considering *Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd.* (2001) 3 SCC 609 and *Harman Electronics Private Limited v. National Panasonic India Pvt. Ltd.*, (2009) 1 SCC 720, held that the Court where the cheque is deposited for collection, has jurisdiction to try the accused under Section 138 of Negotiable Instruments Act in terms of the principles laid down in *K. Bhaskaran v. Sankaran Vaidhyan Balan*, (1999) 7 SCC 510. The Supreme Court held that the issue of territorial jurisdiction of the Courts did not even arise for consideration in *Shri Ishar Alloy Steels Ltd.*(supra), and therefore it does not affect the ratio in *K. Bhaskaran* (supra). The Supreme Court further observed that in *Harman Electronics Private Limited* (supra), the Court held that a notice of dishonor under Section 138 of Negotiable Instruments Act alone would not confer the jurisdiction to try the accused at the place of issuance of the notice. However, the Supreme Court did not deviate from the other principles laid down in *K. Bhaskaran* (supra). In *Nishant Aggarwal* (supra), the Supreme Court re-affirmed the jurisdiction of the Court where the cheque is presented for collection in terms of *K. Bhaskaran* (supra). The relevant portion of the said judgment is reproduced hereunder:

“2. The question which has to be decided in this appeal is whether the Court, where a cheque is deposited for collection, would have territorial jurisdiction to try the accused for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (in short "the N.I. Act") or would it be only the Court exercising territorial

jurisdiction over the drawee bank or the bank on which the cheque is drawn?

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10. Mr. Ahmadi, learned senior counsel for the Appellant in support of his claim that the Court at Bhiwani has no jurisdiction heavily relied on the decision of this Court in *Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd.* (2001) 3 SCC 609. **We were taken through the entire judgment. Though the case is also related to N.I. Act, the issue of territorial jurisdiction was not the subject-matter thereof.** In *Ishar Alloy Steels (supra)*, a three-Judge Bench of this Court defined the term "the bank" appearing in clause (a) of Section 138 of the N.I. Act as the drawer's bank. It was defined in the context of the statutory period of six months as mentioned in clause (a), hence, this Court held that the date of presentation of the cheque for calculating the statutory time period of six months will be the date of presentation of the cheque to the drawer's bank i.e. Payee bank and not the drawee's bank i.e. Collecting bank. This Court has correctly applied the principle of strict interpretation appreciating that Section 138 of the N.I. Act creates an offence as the drawer of the cheque cannot be expected or saddled with the liability to hold the cheque amount in his account beyond six months. **The reading of the entire decision in *Isher Alloy Steel (supra)* shows that jurisdiction of the Court to take cognizance arises only where cheque is presented to the bank of drawer either by drawee's bank or the drawee/payee personally within six months.** In other words, the analysis of the said decision, the ratio of *Isher Alloy Steel (supra)* deals with such a situation where the cheque has been presented within six months to the drawer's bank by the payee in any manner. Inasmuch as the interpretation relates to filing of complaint within the statutory time period of six months, **we are of the view that the reliance on the law laid down in *Isher Alloy Steel (supra)* has no relevance as far as the present case is concerned. In fact, that is the**

reason that in *Isher Alloy Steel (supra)*, the judgment in *K. Bhaskaran (supra)* was not discussed since territorial jurisdiction was not the issue in that case. In view of the same, the definition of the term "the bank" envisaged in *Isher Alloy Steel (supra)* cannot be employed to decide the jurisdictional aspect and dilute the ratio of the judgment in *K. Bhaskaran (supra)*. Hence, we are of the view that on the strength of the judgment in *Isher Alloy Steel (supra)* defining the term "the bank", it cannot be said that jurisdiction to file a complaint under Section 138 of the N.I. Act does not lie at the place of drawee's bank. To put it clearly, the judgment in *Isher Alloy Steel (supra)* does not affect the ratio of the judgment in *K. Bhaskaran (supra)* which provides for jurisdiction at the place of residence of the payer and the payee. In such circumstances, we are of the view that the judgment in *Isher Alloy Steel (supra)* as well as judgments of various High Courts relied on by the Appellant cannot be read against the Respondent to hold that the Magistrate at Bhiwani does not have the jurisdiction to try the complaint.

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12. Mr. Ahmadi, learned senior counsel for the Appellant has also relied on a decision of this Court in *Harman Electronics Private Limited and Anr. v. National Panasonic India Private Limited*: (2009) 1 SCC 720. In *Harman Electronics (supra)*, the complainant and the accused entered into a business transaction. The accused was a resident of Chandigarh. He carried on the business in Chandigarh and issued a cheque in question at Chandigarh. The complainant had a Branch Office at Chandigarh although his Head Office was at Delhi. He presented the cheque given by the accused at Chandigarh. The cheque was dishonoured at Chandigarh. The complainant issued a notice upon the accused asking him to pay the amount from New Delhi. The said notice was served on the accused at Chandigarh. On failure on the

part of the accused to pay the amount within 15 days from the date of the communication of the said letter, the complainant filed a complaint at Delhi. In the complaint, it was stated that the Delhi Court has jurisdiction to try the case because the complainant was carrying on business at Delhi, the demand notice was issued from Delhi, the amount of cheque was payable at Delhi and the accused failed to make the payment of the said cheque within the statutory period of 15 days from the date of receipt of notice. It is further seen that the cognizance of the offence was taken by the learned Magistrate at Delhi. The accused questioned the jurisdiction of the Magistrate at Delhi before the Addl. Sessions Judge, New Delhi. The Sessions Judge held that the Magistrate at Delhi had jurisdiction to entertain the complaint as, admittedly, the notice was sent by the complainant to the accused from Delhi and the complainant was having its Registered Office at Delhi and was carrying on business at Delhi. The learned Judge has also observed that the accused failed to make payment at Delhi as the demand was made from Delhi and the payment was to be made to the complainant at Delhi. The Delhi High Court dismissed the petition filed by the accused. Thereafter, the accused approached this Court. This Court considered Section 138 of the N.I. Act and also referred to *K. Bhaskaran's case (supra)* and quoted the five components of offence under Section 138 which have been noted in paragraph supra. This Court reiterated that the five different acts which are the components of offence under Section 138 of the N.I. Act were done in five different localities, any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the N.I. Act and the complainant would be at liberty to file a complaint at any of those places. **Ultimately, this Court held that the Chandigarh Court had jurisdiction to entertain the complaint because the parties were carrying on business at Chandigarh, Branch Office of**

the complainant was also in Chandigarh, the transactions were carried on only from Chandigarh and the cheque was issued and presented at Chandigarh. This Court pointed out that the complaint did not show that the cheque was presented at Delhi, because it was absolutely silent in that regard and, therefore, there was no option but to presume that the cheque was presented at Chandigarh. It is not in dispute that the dishonour of the cheque also took place at Chandigarh and, therefore, the only question which arose before this Court for consideration was whether the sending of notice from Delhi itself would give rise to a cause of action in taking cognizance under the N.I. Act. In such circumstances, we are of the view that *Harman Electronics (supra)* is only an authority on the question where a court will have jurisdiction because only notice is issued from the place which falls within its jurisdiction and it does not deviate from the other principles laid down in *K. Bhaskaran (supra)*. This Court has accepted that the place where the cheque was presented and dishonoured has jurisdiction to try the complaint. In this way, this Court concluded that issuance of notice would not by itself give rise to a cause of action but communication of the notice would. In other words, the court clarified only on the service in such notice and failure on the part of the accused to pay the demanded amount within a period of 15 days, thereafter, the commission of an offence completes. We are of the view that this Court in *Harman Electronics (supra)* affirmed what it had said in *K. Bhaskaran (supra)* that court within whose jurisdiction the cheque is presented and in whose jurisdiction there is failure to make payment within 15 days of the receipt of notice can have jurisdiction to try the offence under Section 138 of the N.I. Act. It is also relevant to point out that while holding that the Chandigarh Court has jurisdiction, this Court in *Harman Electronics (supra)* observed that in the case

before it, the complaint was silent as to whether the said cheque was presented at Delhi. In the case on hand, it is categorically stated that the cheque was presented at Bhiwani whereas in *Harman Electronics (supra)* the dishonour had taken place at Chandigarh and this fact was taken into account while holding that Chandigarh court has jurisdiction. In the complaint in question, it is specifically stated that the dishonour took place at Bhiwani. We are also satisfied that nothing said in *Harman Electronics (supra)* had adverse impact on the complainant's case in the present case.

13. As observed earlier, we must note that in *K. Bhaskaran (supra)*, this Court has held that Section 178 of the Code has widened the scope of jurisdiction of a criminal court and Section 179 of the Code has stretched it to still a wider horizon. Further, for the sake of repetition, **we reiterate that the judgment in *Ishar Alloy (supra)* does not affect the ratio in *K. Bhaskaran (supra)* which provides jurisdiction at the place of residence of the payer and the payee.** We are satisfied that in the facts and circumstances and even on merits, the High Court rightly refused to exercise its extraordinary jurisdiction under Section 482 of the Code and dismissed the petition filed by the Appellant-accused.

14. In the light of the above discussion, **we hold that the ratio laid down in *K. Bhaskaran (supra)* squarely applies to the case on hand.** The said principle was correctly applied by the learned Sessions Judge as well as the High Court. Consequently, the appeal fails and the same is dismissed. In view of the dismissal of the appeal, the interim order granted by this Court on 09.12.2011 shall stand vacated.”

(Emphasis supplied)

7. These cases are squarely covered by *Nishant Aggarwal (supra)* as the cheques in question were deposited at Delhi and therefore, the learned Metropolitan Magistrate had clear

jurisdiction to entertain and try the complaints under Section 138 of the Negotiable Instruments Act.

Inquiry under Section 202 Cr.P.C.

8. Second ground of challenge is that the learned Metropolitan Magistrate has not conducted any inquiry or investigation in terms of Section 202 Cr.P.C. There is no merit whatsoever in this ground as the learned Metropolitan Magistrate took into consideration the evidence by way of affidavit of the complainant and the documentary evidence on the basis of which *prima facie* case was made out against the petitioners.

9. No further enquiry was warranted in the matter. This case is squarely covered by ***Abhishek Agrawalla v. Boortmalt NV, (2011) 122 DRJ 42***, in which this Court held as under:

“3. The only ground pressed during arguments of this petition assailing order of learned MM is that the order was bad in law in view of the fact that the trial court failed to comply with the provisions of Section 202 Cr.P.C whereunder the trial court was supposed to postpone the issue of process and was to conduct an inquiry either himself or direct investigation to be made by the police officials into the allegations since the accused was residing at a place beyond the area in which the trial court had jurisdiction.

4. It is submitted by the counsel for the petitioner that recording of complainant’s evidence on oath and evidence of witnesses was required to be done by the Magistrate under

Section 200 Cr.P.C and the Magistrate after recording complainant's evidence can issue process in respect of accused person living within the jurisdiction. However, if the accused was living beyond the jurisdiction of the court i.e. accused was not living within Delhi, then in view of Section 202 Cr.P.C mere recording of complainant's evidence and witnesses was not sufficient and an inquiry was required to be conducted mandatorily under the provisions of Section 202 Cr.P.C before issuing process.

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8. There are two kinds of cases which come before the court, one where the offence is sought to be proved from documents and the oral testimony is given before the court to prove the documents by exhibiting the documents and by deposing as to when the documents were executed and by whom. The other kind of cases are where the case does not depend on documentary evidence and depends upon only the oral testimony. These are cases of physical hurt, injuries, threats etc. In order to protect an innocent person being summoned by the Magistrate on the basis of oral testimony of a person and considering that a large number of false complaints were being filed at far-off places just to harass the people, the Parliament had amended Section 202 so that the summoning orders were not issued mechanically by the Magistrates and whenever the accused was of other State an investigation or enquiry into the allegations was mandatorily conducted either by the Magistrate himself or through police. Say for example, a person files a complaint that on telephone he had been threatened by a person seeking ransom or he had been threatened to be killed and the person who allegedly threatened him was living outside the jurisdiction of the court. Before acting on this oral statement of the victim, it

would be incumbent upon the court to make an enquiry about the call details, about the telephone and about telephone number from which the threat was allegedly received and the telephone number of the complainant. The call details for period around the date of incident would show if the calls had been made frequently or it was a solitary call and the Magistrate can also make enquiry about the person in whose name the telephone was standing. This would enable the Magistrate to find out if there was credibility in the statement given by the complainant. The Magistrate can summon the officials of service provider telephone company and make this enquiry himself. Similarly there may be a case where a person alleges that while he was at X place, Y a resident of other State had come there and beaten him or abused him or threatened him or caused injuries to him etc. The person produces his MLC and makes an oral statement. The court in such a case, if the accused is of outside his jurisdictional area, would have to get an enquiry made through police if the accused was living at the address given and if the accused had visited the place where it was alleged that he had beaten or threatened. The Magistrate can also get a fact finding enquiry done from police of that State or police of his own State. However, where the commission of offence is disclosed only from the documents, no further enquiry except scrutinizing the documents proved before the court by testimony of complainant is feasible, I consider that the enquiry envisaged under Section 202 Cr.P.C in such cases is an enquiry by way of recording statement of complainant and careful scrutiny of documents relied upon by the complainant. Say, if a case against the accused is filed under Section 138 of Negotiable Instruments Act and the accused lives in Noida while the complainant lives in Delhi. The Magistrate in such a case has

only to consider if prima facie offence was committed or not and if it has jurisdiction based on the documents i.e. whether the cheque was dishonoured, whether the proper demand notice was sent and still payment was not made etc. Similarly there are several statutes where the offence is of technical nature and the commission of offence can be made out from the documents, say the offences under the Companies Act, against the directors of the company for violating the mandatory provisions regarding filing of returns etc. The company may be registered in Delhi but the director may be living in Noida or Gurgaon. In such a case, the commission of offence has to be inferred only from the documents and the enquiry under Section 202 Cr.P.C has to be limited to scrutiny of the documents and recording of statement of the complainant and cannot go beyond that.

9. What is the import of provisions of Section 202 Cr.P.C can be seen from the decision of the Supreme Court in 2000(2) SCC 230 Rozy and another vs. State of Kerala. In this case another provisions of sub Section 202, which is also couched in mandatory language had come into question i.e. Section 202(2) proviso. This proviso provides that where the offence was triable by the court of Sessions, the Magistrate shall call upon the complainant to produce all his witnesses and examine them on oath. The proviso is couched in mandatory words and the mandate is “He shall call upon the complainant to produce all his witnesses and examine them on oath”. The Supreme Court in this case observed that the issue of complying with proviso to Sub Section 2 of Section 202 Cr.P.C would arise only in cases where the Magistrate before taking cognizance of the case, decides to hold enquiry and after enquiry if he decides to take the evidence of witnesses on oath. The object and purpose of holding an

enquiry or investigation under Section 202 Cr.P.C is to find out whether there was sufficient ground for proceeding against the accused or not and that holding enquiry or investigation is not an mandatory course before issue of process against the accused or dismissal of the complaint. It is an enabling provision to form an opinion as to whether or not process should be issued and to remove from his mind any hesitation that he may have fallen upon on mere perusal of the complaint and consideration of complainant's evidence on oath.

10. The Supreme Court further observed that the enquiry under Section 202 is of a limited nature. Firstly it is to find out whether there was a prima facie case against a person accused of the offence in the complaint and secondly to prevent the issuance of process in all such complaints that are false or intended only to harass a person. In *Kewal Krishan v Suraj Bhan* 1980 Supp. SCC 499, the Supreme Court observed that what the Magistrate has to do is to see whether on a cursory perusal of the complaint of the complaint and the evidence recorded under preliminary enquiry under Section 200 and 202 Cr.P.C there is prima facie evidence in support of the charges leveled against the accused. About use of the word 'shall' in the proviso to sub section 2, the Supreme Court made following observations:

“17. At initial stage, if objection is raised and it is found by the Sessions Court that by non-holding of inquiry, prejudice is caused to the accused, he may direct the Magistrate to follow the procedure prescribed under the proviso. It is no doubt true that by the use of the words "shall", it appears that language used in the proviso is of mandatory nature.

At the same time, it is a procedural law and it is to be read in context of Section 200 which enables the Magistrate to issue process without holding any inquiry and that inquiry under Section 202 is itself discretionary one giving option to examine or not to examine witnesses. Hence, proviso to the said subsection is required to be read accordingly though couched in mandatory term by using the word 'shall'. Normally, the procedure prescribed therein should be followed, but non-observance of the said procedure may not vitiate further proceedings in all cases. In a case where a complaint is filed, not by the public servant, and where the offence is exclusively triable by the court of Session the Magistrate should follow the proviso to sub-section (2) of Section 202 and call upon the complainant to produce all his witnesses and examine them on oath. This would be in consonance with the provision of Section 208 which inter alia provides for supply of copy of statements and documents to accused. This would also facilitate the Sessions Court in framing the charge or discharging the accused. In the Sessions triable case, under Section 226 the prosecution has to open its case by describing the charge brought against the accused and stating by what evidence it proposes to prove the guilt of the accused. On such submission, the Sessions Court is required to consider the record of the case and the documents submitted therewith and after hearing the submissions of the accused and prosecution in this behalf, to decide whether there is sufficient ground or not for proceeding against the accused. Upon such consideration, if the court finds that there is no sufficient ground for proceeding against the accused,

he shall be discharged as provided under s. 227. In case, where there is sufficient ground, court is required to frame the charge as provided under s. 228. Hence, for the purpose of framing the charge also the recording of such evidence is necessary. It also facilitates the accused to know allegation made against him as well as evidence in support thereof. However, in a case where complaint is filed by a public servant after holding inquiry and recording the statements, question of recording of such evidence may not arise. Hence, compliance of proviso by the Magistrate in all Sessions triable cases is not a must and would not vitiate the further trial unless prejudice caused to the accused is established.”

11. I, therefore, consider that in the present case where disclosure of commission of offence was based on documentary evidence produced by the complainant before the court and from the documents it was prima facie clear that a commission of offence under Section 420 IPC has taken place, no further enquiry could have been held by the Magistrate.

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13. In *Rosy v State* (supra) the Supreme Court also agreed with the submission of counsel for the appellant that the provisions under Section 465 Cr.P.C would play a role at any stage and observed as under:

‘18. Further, the aforesaid interpretation would be in consonance with Chapter XXXV of the Cr.P.C., which deals with irregularities in the proceedings, which may or may not vitiate the proceedings. Sections 460 and 461 provide which irregularities

would or would not vitiate the proceedings. In these sections, there is no mention of Section 202, For our purpose reference to Section 465 would suffice, which inter alia specifically provides that irregularity in the complaint, summons, warrant, order or other proceedings before or during trial or in any inquiry shall not be a ground for reversing order passed by the competent Court, unless in the opinion of that Court a failure of justice has in fact been occasioned thereby. Sub-section (2) further provides that in determining whether any irregularity in proceeding has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. Hence, the statute does not expressly provide for nullification of the order as a consequence of noncompliance of proviso to sub-section (2) of Section 202, but provides that unless prejudice is caused, the order is not to be set aside. This would mean that during inquiry under Section 202 when Magistrate examines the witnesses on oath, as far as possible the proviso is to be complied with but the mandate is not absolute.”

14. I consider that the learned MM rightly issued summon as against the petitioner/accused in this case and no further enquiry apart from the enquiry already held by way of examination of witnesses of complainant and examined documents was feasible in this case. The enquiry or investigation under Section 202 Cr.P.C has to be done in all those cases where the case is based only on oral evidence and accused lives beyond jurisdiction of court verification about presence of accused or about such other factors like use of telephone etc is involved and the Magistrate in all

such cases mandatorily hold an enquiry either himself or through police.”

This petition is gross abuse and misuse of process of law

10. In *Rajesh Aggarwal v. State*, 2010 (171) DLT 51, this Court noted that the High Court is flooded with petitions under Section 482 Cr.PC for challenging the summoning order passed by the Magistrate under Section 138 of the Negotiable Instruments Act. This Court further noted that the accused rush to the High Court on mere passing of summoning order and are successful in halting the proceedings before the Magistrate on one or the other ground while the kind of defence raised by the petitioners is required to be raised before the Magistrate at the very initial stage as per the law. The object of the proceedings under Section 138 of the Negotiable Instruments Act is that the cheques should not be used by persons as a tool of dishonesty and once a cheque is issued by a person, it must be honoured and if it is not honoured, the person is given an opportunity to pay the cheque amount by issuance of a notice and if he still does not pay, he must face the criminal trial and consequences. However, the effort of some of the petitioners is to teach a lesson to complainant for approaching court of law. The amount of cheque is not paid despite demand notice and the complainant is made to suffer further by prolonging the litigation carrying it from one forum to other. In many cases, the petitioners do have genuine defence, but, due to mis-reading of the provisions of Negotiable Instruments Act and Cr.P.C., it is considered that the

only option available is to approach the High Court and on this the High Court is made to step into the shoes of Metropolitan Magistrate and examine their defence first and exonerate them. This Court noted the reasons for delay in disposal of cases under Section 138 of the Negotiable Instruments Act and held that the accused cannot appear before the High Court without appearance and disclosure of defence before the Magistrate. This Court laid down the following principles relating to the proceedings under Section 138 of the Negotiable Instruments Act:-

“1. Section 143 of the Negotiable Instrument Act:

Under Section 143 of the Negotiable Instrument Act, all offences are to be tried in accordance with summary trial provisions of Section 260 to 265 of Cr.P.C. In case of conviction of the accused under Section 138, the Magistrate can pass an order of imprisonment up to one year and fine not exceeding `5,000/-. However, if the Magistrate finds that the nature of the case warrants imprisonment exceeding year, the Magistrate shall, after hearing the parties, pass a reasoned order for hearing the case as a summons trial case and recall the witnesses who may have been examined.

2. Section 145 of the Negotiable Instrument Act:

2.1 Complainant’s evidence to be by way of affidavit

Under Section 145 of the Negotiable Instrument Act, the evidence of the complainant is to be given by way of affidavit which shall be read in evidence.

2.2 Cognizance of the offence to be taken on the basis of affidavit and documents

The affidavit and the documents filed by the complainant along with complaint for taking cognizance of the offence are good enough to be read in evidence at both the stages i.e. pre-summoning stage and the post summoning stage.

2.3 Complainant not required to examine himself twice

The complainant is not required to examine himself twice i.e. once after filing the complaint and second after summoning of the accused.

2.4 Complainant not required to be recalled unless a specific order of Magistrate under Section 145(2) of Negotiable Instruments Act

The complainant is not required to be recalled and re-examined after summoning of accused unless the Magistrate passes a specific order as to why the complainant is to be recalled. Such an order is to be passed on an application made by the accused or under Section 145(2) of N.I. Act suo moto by the Court.

3. Summary Procedure under Section 260 to 265 Cr.P.C.

- 3.1** In summary trial, after the accused is summoned, his plea is to be recorded under Section 263(g) of Cr.P.C. and his examination if any can be done by Magistrate and a finding can be given by the Court under Section 263(h) of his examination. The same procedure is to be followed by the Magistrates for offence of dishonour of cheque and if during the course of summary trial, it appears to the Magistrate that nature of case was such that it was desirable to try it as a

summons trial, he has power to recall any witness who has been examined and proceed to re-hear the case in the manner provided in the Code.

- 3.2** Onus to prove that no offence is committed is on the accused. If proviso (a), (b) and (c) to Section 138 of N.I. Act are shown to have been complied with, technically the commission of offence stands completed. It is for the accused to show that no offence could have been deemed to be committed by him for some specific reasons and defences. He cannot simply say "I am innocent" or "I plead not guilty"

4. Procedure Prescribed Under Law:

4.1 Cognizance of offence upon examination of complaint, affidavit and documents

The procedure as prescribed under law is that along with complaint under Section 138 of N.I. Act, the complainant should file affidavit of his evidence and all necessary documents like dishonour memo, returned cheque, notice of demand and then learned Magistrate should scrutinize the complaint and documents and if he finds that the affidavit and the documents disclose dishonour of cheque issued by the accused, issuance of a demand notice by the complainant, non-payment of the cheque amount by the accused despite notice, cheque return-memo of the bank etc. and the complaint was filed within the period of limitation, cognizance is to be taken and notice of appearance of accused should be sent to the accused.

4.2 Accused must disclose his defence on the first date of hearing

4.2.1 In case the accused appears before the court of Magistrate, the Court should ask him as to what was his plea of defence. Normally, the first date is wasted by the courts of Magistrate just by taking bail bond of the accused and passing a bail order, while Sections 251 and 263(g) of Cr.P.C. provide that when the accused appears before Magistrate in a summary trial proceedings, the particulars of the offence, to which he is accused, shall be stated to him and he should be asked whether he pleads guilty or he has any defence to make. This is the mandate of Section 143 of N.I. Act, which provides summary trial of offence in terms of Cr.P.C.

4.2.2 Under Section 263(g) of Cr.P.C., the court has to record the plea of the accused and his examination. It is thus obvious that in a trial of an offence under Section 138 of N.I. Act, the accused cannot simplicitor say "I plead not guilty" and wants to face trial.

4.2.3 Since offence under Section 138 of N.I. Act is a document based technical offence, deemed to have been committed because of dishonour of cheque issued by the accused or his company or his firm, the accused must disclose to the Court as to what is his defence on the very first hearing when the accused appears before the Court.

4.3 Accused cannot appear before High Court without appearance and disclosure of defence before the Magistrate

4.3.1 If the accused does not appear before the Court of Magistrate on summoning and rather approaches High Court, the High Court has to refuse to entertain him and ask him to appear before the Court of Magistrate as the High Court cannot usurp the powers of

Magistrate and entertain a plea of accused why he should not be tried under Section 138.

- 4.3.2 The plea as to why he should not be tried under Section 138, is to be raised by the accused before the Court of Magistrate under Section 251 and under Section 263(g) of Cr.P.C. Along with his plea, he can file necessary documents and also make an application, if he is so advised, under Section 145(2) of N.I. Act to recall the complainant to cross-examine him on his plea of defence. However, only after disclosing his plea of defence he can make an application that the case should not be tried summarily but as a summons trial case. This application must disclose the defence of the accused and the reasons why he wants the case to be tried as a summons trial.

4.4 **Onus to prove the defence is on the accused under Section 106 of the Evidence Act, 1872 and it is not violative of Article 21 of the Constitution**

- 4.4.1 An argument is raised that the accused, under Article 21 of Constitution of India, has a right of silence in a criminal trial and therefore he cannot be forced to disclose his defence. This argument is misconceived in view of Section 106 of Indian Evidence Act. Since an offence under Section 138 of N.I. Act is technical in nature and defence which an accused can take are inbuilt, like the cheque was given without consideration, the accused was not Director at that time, accused was a sleeping partner or a sleeping Director, cheque was given as a security etc. etc., the onus of proving these defences is on the accused alone, in view of Section 106 of Evidence Act. Since the mandate of Legislature is trial of such cases in a summary manner, the evidence already given by the complainant by way of affidavit is sufficient proof of the offence and this evidence is not required to be given again in terms of Section 145(1) of N.I. Act and has to be read during the trial.

- 4.4.2 The witnesses i.e. the complainant or other witnesses can be recalled only when accused makes an application and this application must disclose the reason why accused wants to recall the witnesses and on what point witness is to be cross examined.
- 4.4.3 When it is within the special knowledge of the accused as to why he is not to face trial under Section 138 N.I. Act, he alone has to take the plea of defence and burden cannot be shifted to complainant. There is no presumption that even if an accused fails to bring out his defence, he is still to be considered innocent.
- 4.4.4 If an accused has a defence against dishonour of the cheque in question, it is he alone who knows the defence and responsibility of spelling out this defence to the court and then proving this defence is on the accused.
- 4.4.5 The proper procedure to be followed by Magistrate is that soon after summoning, the accused must be asked to disclose his defence and his plea should be recorded.
- 4.4.6 Where an accused takes no defence and simply says "I am innocent", there is no reason for the Magistrate to recall the complainant or witnesses during summary trial and the evidence already given by the complainant has to be considered sufficient and the trial court can ask the accused to lead his evidence in defence on the plea of innocence as the evidence of the complainant is already there.

4.5 In a summary trial, a complainant or his witness cannot be recalled in the court for cross examination only for the sake of pleasure

- 4.5.1 Once the complainant has brought forward his case by giving his affidavit about the issuance of cheque, dishonour of cheque, issuance of demand notice etc., he can be cross examined only if the accused makes an application to the court as to on what point he wants to cross examine the witness(es) and then only

the court shall recall the witness by recording reasons thereto.

- 4.5.2 In most of the cases, the court of Magistrate may not feel necessary that a sentence of imprisonment of more than one year should be inflicted. Unless the court, for reasons to be given, considers that the punishment in a case should be more than one year, the court cannot deviate from the procedure of summary trial and cannot ask the accused to appear again and again and defeat the very purpose of summary trial. Section 143 and 145 of N.I. Act were enacted by the parliament with the aim of expediting trial in such cases. The provisions of summary trial enable the respondent to lead defence evidence by way of affidavit and documents. Thus an accused who considers that he has a tenable defence and the case against him was not maintainable, he can enter his plea on the very first day of his appearance and file an affidavit in his defence evidence and if he is so advised, he can also file an application for recalling any of the witnesses for cross examination on the defence taken by him.

4.6 Service of summons on the accused

- 4.6.1 Under Section 144 of N.I. Act, service of accused can be effected through registered post/speed post or by courier service and if the accused refuses to receive the summons, he can be declared served and court can take coercive measures for entering appearance of the accused. Chapter VI of Cr.P.C., under Section 62, 63 and 64, provides how summons are to be served on accused persons by police. Section 65 thereof provides that if service cannot be effected in the manner as provided in Section 62, 63 or 64 of Cr.P.C., the serving officer shall affix one copy summon on some conspicuous part of his house or area in which the accused resides and the court after making such

inquiries may declare that the summons have been duly served. Thus service by affixation is a valid mode of service under criminal law and wherever the accused is evading his service, the court of Magistrate should direct service through affixation as provided under Section 65 of Cr.P.C. and in case the accused does not appear the court is at liberty to take steps for coercive appearance.

4.6.2 An issue arises where there are many accused persons in a case and some of them are not appearing, should the court proceed against those who are appearing or should wait for the completion of service of all the accused? I consider that summary trial leaves no option to the court. The whole purpose of summary trial shall stand defeated if the court of Magistrate tells the accused persons, who have been served, to come to the court repeatedly till the other accused are served. The plea of the accused is to be recorded on the day of his appearance under the summary trial and if that accused gets his plea recorded, he is at liberty to lead evidence in support of his plea and the court cannot tell him to keep coming repeatedly either in person or through counsel due to non appearance of other accused persons. The court, in such a case, asks him to disclose his defence and to prove his defence. In case court feels that the case should not be tried summarily and all the accused persons must necessary be tried together, then alone the court should ask the accused to wait but if the accused/respondent has a valid defence to show that he need not face trial because of a specific defence and he was prepared to lead evidence to this effect, he should be directed to lead evidence in support of his plea.

4.7 Settlement by the accused

Along with the notice of appearance, in view of the judgment of Supreme Court in **Damodar S. Prabhu**

v. Sayed Babalal H., AIR 2010 SC 1907, the court of Magistrate should also inform the accused that in case he wants to make the payment of the cheque amount, he should either in person or through his counsel or representative sent the cheque amount, either in cash or through draft so that the same can be paid to the complainant and the case would thus come to an end. The accused also has liberty to make application on the very first day that he wants to compromise and in terms of the judgment given by Supreme Court in **Damodar S. Prabhu** (Supra) the court should dispose of the case by asking the accused to pay the cheque amount to complainant. The court should also bring to the notice of accused that incase he does not compromise at that stage, and if he enters compromise at subsequent stages then he will have to pay costs in terms of judgment of Supreme Court.

5 Conclusion

The summary trial procedure to be followed for offences under Section 138 of Negotiable Instrument Act, 1881 would thus be as under:

- 5.1 On the day complaint is presented, if the complaint is accompanied by affidavit of complainant, the concerned Magistrate shall scrutinize the complaint and documents and if commission of offence is made out, take cognizance and direct issuance of summons of accused, against whom case is made out.
- 5.2 If the accused appears, the Magistrate shall ask him to furnish bail bond to ensure his appearance during trial and ask him to take notice under Section 251 Cr.P.C. and enter his plea of defence and fix the case for defence evidence, unless an application is made by an

accused under Section 145(2) of N.I. Act for recalling a witness for cross examination on plea of defence.

5.3 If there is an application under Section 145(2) of N.I. Act for recalling a witness of complainant, the court shall decide the same, otherwise, it shall proceed to take defence evidence on record and allow cross examination of defence witnesses by complainant. ...”

10.1 These cases are squarely covered by the aforesaid judgment and the petitioners are guilty of gross abuse and misuse of the process of law as the petitioners did not disclose their defence before the learned Metropolitan Magistrate in terms of the judgment of this Court in *Rajesh Aggarwal* (supra). That apart, the petitioners have also not chosen to disclose their defence before this Court.

Imposition of Costs

11. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. The cost should be equal to the benefits derived by the litigants, and the harm and deprivation suffered by the rightful person so as to check the frivolous litigations and prevent the people from reaping a rich harvest of illegal acts through Court. The costs imposed by the Courts must be the real costs equal to the deprivation suffered by the rightful person and also considering how long they have compelled the other side to contest and defend the litigation in various courts. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible

to maintain purity and sanctity of judicial proceedings. The parties raise fanciful claims and contests because the Courts are reluctant to order prosecution. The relevant judgments in support of this preposition are as under:-

11.1 In *Ramrameshwari Devi v. Nirmala Devi*, (2011) 8 SCC 249, the Supreme Court has held that the Courts have to take into consideration pragmatic realities and have to be realistic in imposing the costs. The relevant paragraphs of the said judgment are reproduced hereunder:-

“52. ...C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings. ...

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54. While imposing costs we have to take into consideration pragmatic realities and be realistic what the Defendants or the Respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc.

55. The other factor which should not be forgotten while imposing costs is for how long the Defendants or Respondents were compelled to

contest and defend the litigation in various courts.

The Appellants in the instant case have harassed the Respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The Appellants have also wasted judicial time of the various courts for the last 40 years.

56. On consideration of totality of the facts and circumstances of this case, we do not find any infirmity in the well reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which we quantify as Rs. 2,00,000/- (Rupees Two Lakhs only). We are imposing the costs not out of anguish but by following the fundamental principle that wrongdoers should not get benefit out of frivolous litigation.”

(Emphasis supplied)

11.2 In *Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria*, 2012 (3) SCALE 550, the Supreme Court held that heavy costs and prosecution should be ordered in cases of false claims and defences as under:-

“85. This Court in a recent judgment in *Ramrameshwari Devi and Ors.* (supra) aptly observed at page 266 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. In this very judgment, the Court provided that this problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation. The Court observed at

pages 267-268 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. **In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.**”

(Emphasis supplied)

11.3 In *Padmawati v. Harijan Sewak Sangh*, **154 (2008) DLT 411**, this Court imposed costs of Rs.15.1 lakhs and noted as under:

“6. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equa321 to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Courts. One of the aim of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person.

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9. Before parting with this case, I consider it necessary to pen down that one of the reasons for

over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrong doer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts.”

(Emphasis supplied)

Conclusion

12. There is no merit in these petitions. These petitions amount to gross abuse and misuse of process of law. The petitioners have succeeded in delaying the complaints before the Metropolitan Magistrate for more than two years. The petitions are consequently dismissed with cost of Rs.30,000/- each. The cost be paid by the

petitioners to the respondent within four weeks. The Metropolitan Magistrate shall resume the proceedings forthwith and shall endeavour to complete the trial within six months. The parties shall appear before the Metropolitan Magistrate on 18th November, 2013.

13. Copy of this judgment be sent to learned counsels for both the parties.

14. LCR be returned back forthwith.

15. Dasti.

J.R. MIDHA, J

NOVEMBER 01 , 2013