

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO. 716 OF 2015
with
CRIMINAL APPLICATION NO. 717 OF 2015
with
CRIMINAL APPLICATION NO. 718 OF 2015

Dr. (Mrs) Rajul Ketan Raj ..Petitioner

v/s.

Reliance Capital Ltd. & Anr. ..Respondents

Mr. Manohar H. Ramsinghani a/w. D.M.Galani for the Applicant
Ms. Krupali Rajani for the respondent.
Mrs.R.V.Newton, APP for the Respondent/State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
RESERVED ON : 08th OCTOBER, 2015
PRONOUNCED ON : 12th FEBRUARY, 2016.

JUDGMENT.

1. Rule. Rule made returnable forthwith with the consent of the parties.
2. The applicant, who is an accused no.1 in C.C.No.2995/SS/2013, C.C.No.1348/SS/2012 and C.C.No.1350/SS/2012, has invoked the powers of this court under Section 482 of Cr.P.C. for quashing the impugned orders

dated 24.4.2015 whereby the learned Sessions Judge, Gr. Mumbai, dismissed the revision applications Nos.502 of 2014, 299 of 2014 and 101 of 2014 for quashing the process against the applicant for offence under Section 138 of the Negotiable Instruments Act.

3. The brief facts necessary to decide these applications are as under:

The respondent no.1- complainant had filed complaints against the applicant, one Mr. Ketan Raj and Jeevandeep Hospital & Critical Care Centre (hereinafter referred to as Jeevandeep Hospital) for offence under Section 138 of the Negotiable Instruments Act. It is alleged that the applicant and the other two accused were in need of finance and had therefore approached the complainant company with a request to grant medical equipment loan facility. After considering the said request and upon execution of various documents, the complainant company disbursed the loan.

4. The applicant had issued a cheque dated 10.9.2013 for Rs.97,962/- (subject matter of CC/2995/SS/2013), two cheques dated 1.5.2012 for Rs.2,13,552 and Rs.2,03,280/- (subject matter of CC/1348/2012) and a

cheque dated 1.5.2012 for Rs.91218/- (subject matter of CC/1350/2012) in favour of the complainant towards repayment of the loan. The said cheques were dishonoured with remark “account closed”. The complainant company issued demand notices and called upon the applicant and the other accused to repay the loan amount. The applicant and the other accused having failed to pay the cheque amount, the complainant company filed the afore stated complaints for offence under Section 138 of the Negotiable Instruments Act.

5. The learned Magistrate by orders dated 11.7.13 and 13.11.2013 issued process against the applicant and the other two accused for offence under Section 138 of the Negotiable Instruments Act. The applicant herein had challenged the said orders before the Court of Sessions, Greater Mumbai. The revision applications came to be dismissed by the impugned orders dated 24.4.2015. Being aggrieved by the said orders, the applicant has invoked the jurisdiction of this court under Section 482 of Cr.P.C. for quashing the said orders dated 24.4.2015 as well as the orders of issuance of process.

6. Mr.Ramsinghani, the learned Counsel for the applicant has submitted that the subject cheques were drawn on the account maintained by the accused no.3 Jeevandeep Hospital, a proprietorship concern and not on the account maintained by the applicant accused no.1. The learned Counsel for the applicant has further submitted that the applicant is neither a proprietress of the accused no.3 Jeevandeep Hospital nor the drawer of the subject cheques, but she had signed the cheques only as an authorized signatory of the accused no.3 Jeevandeep Hospital. The learned Counsel for the applicant therefore contends that the applicant is not liable to be prosecuted for the offence under Section 138 of the Negotiable Instruments Act. In support of these contention he has relied upon the decisions in the case of (i) ***Bimal Singh Kothari v. State of Goa [2008(1) Mh.L.J. 841]*** and (ii) ***Aparna Shah v. Sheth Developers Pvt. Ltd. [2013(4) Bom. C.R. 879 (SC)]***.

7. Ms. Rajani, the learned Counsel for the respondent submitted that the applicant herein was the first borrower of the said loan and that the loan application shows that the applicant runs the said Jeevandeep Hospital. The learned Counsel for the respondent has further stated that the loan

account statement is in the name of the applicant herein. Furthermore, the applicant no.1 being the principal borrower as well as the drawer of the cheques is liable under the provisions of Section 138 of the Negotiable Instruments Act.

8. I have considered the submissions advanced by the learned counsels for the respective parties. At the outset it may be mentioned that the complaint is not filed under Section 141 of N.I.Act and the applicant herein and one Ketan (A2) are not prosecuted either as the directors or partners of the accused no.3 Jeevandeep Hospital. The complaint is filed under section 138 N.I.Act with allegations that the cheques issued by the applicant accused towards repayment of medical equipment loan were dishonoured and that the applicant accused had not paid the said amount despite the statutory notices.

9. Relying upon *Raman v. Krishna Pharmaceutical Distributors [(1994) CCR 1601 (Madras HC)]* and *Satish Jayantilal Shah v. Pankaj Mashruwala [1996 CRI.L.UJ. 3099 (Guj.H.C.)]*, the learned Counsel for the applicant submits that the proprietary concern not being a juristic person cannot be prosecuted.

10. In Raman (supra) and Satish Jayantilal Shah (supra) it has been held that a proprietary concern not being a legal and juristic entity, it cannot initiate any proceedings nor can any proceedings be initiated against it, and it is only the proprietor who can either indict or be indicted. There is no dispute about this settled proposition. It is however to be noted that Ketan Raj and Jeevandeep Hospital have neither challenged the order of issuance of process nor they are parties to these proceedings. The orders of issuance of process are challenged by the applicant herein on the ground that she was not the drawer of the cheque. Hence, the only question which falls for determination is whether the applicant herein is liable to be prosecuted under Section 138 of the N.I.Act.

11. At this stage it is advantageous to refer to the decision of the Apex Court in *Aparna Seth vs. Sheth Developers [2013(4) Bom CR 829]* wherein the Apex Court has held that under Section 138 of the N.I.Act, it is only the drawer of the cheque who can be prosecuted. The Apex Court has further held that under Section 138 of the Negotiable Instruments Act, in case of issuance of cheque of joint accounts, the joint account holder cannot be prosecuted unless the cheque has been signed by each and every person

who is a joint account holder. The Apex Court has further held that the culpability attached to dishonour of a cheque can, in any case “except in case of Section 141 of the N.I.Act” be extended to those on whose behalf the cheque is issued. The Apex Court has reiterated that it is only the drawer of the cheque who can be made an accused in any proceeding under Section 138 of the N.I.Act.

12. In the instant case, the applicant is undisputedly a signatory to the subject cheques. The said cheques were drawn on account No.501906010250031 in Vijaya Bank, Mumbai in the name of Jeevandeep Hospital, and the applicant herein had signed the same as an authorized signatory of Jeevandeep Hospital. It is in these circumstances that the applicant has claimed that she is not a drawer of the cheques and hence not liable to be prosecuted for the offence under section 138 N.I.Act.

13. In this regard it is pertinent to note that the averments in the complaint vis-à-vis the loan agreement, which is an uncontroverted document, reveals that the applicant herein and Ketan were in need of finance and had approached the complainant company with a request to

grant medical equipment loan facility. The applicant and Ketan had executed the required documents whereupon the complainant company had sanctioned the loan to the applicant and Ketan. In the said loan application the applicant had given her professional details as 'self employed' and the business name was given as 'Jeevandeep Hospital' which was specified as own 'individual business'. The loan agreement was signed by the applicant as a borrower and by Ketan as a co-borrower. The applicant had also signed the demand promissory note to pay the loan amount with interest. The complainant has also placed on record the loan account statement, a perusal of which clearly indicates that the said loan account is in the name of the present applicant.

14. It is pertinent to note that in Bimal Singh (supra) the cheques were issued on an account maintained by the company which is a distinct entity. No notice was given to the company and the company was not arrayed as an accused. Under these circumstances, it was held that no process could have been issued against the accused only because he had signed the cheque on behalf of the company as an authorized signatory.

15. In the instant case the applicant had not applied for and availed the loan as an authorized signatory of Jeevandeep Hospital. She had also not signed the demand promissory note as an authorized signatory of Jeevandeep Hospital. On the contrary the records prima facie indicate that the applicant and Ketan had applied for and availed the loan in their individual capacity. Furthermore the applicant had signed the demand promissory note and had thereby agreed to repay the said loan and had accordingly issued the subject cheques towards repayment of the said loan. Under these circumstances, the mere fact that the applicant had issued the cheques on the account of Jeevandeep Hospital, which is not a legal entity and only a business concern of the applicant, would not prima facie indicate that the applicant is not a drawer of the cheque. The records prima facie indicate that the applicant had issued the said cheques towards discharge of her personal liability. Hence, the principles laid down in Bimal Singh are not applicable to the facts of the present case.

16. The uncontroverted assertions made in the complaint as well as the documents produced in support thereof prima facie disclose the essential ingredients of the offence under Section 138 of the N.I.Act qua the

applicant. Suffice it to say that the court in exercise of its jurisdiction under Section 482 of Cr.P.C. cannot go into the truth or otherwise of the allegations made in the complaint or delve into the disputed question of facts. The issues raised by the applicant by way of defence can be canvassed before the trial court and the same will have to be adjudicated on merit of the case and not at this stage.

17. The learned Counsel for the applicant has further submitted that the learned Magistrate has issued the process without complying with the mandatory provisions of Section 202 Cr.P.C. He has placed reliance upon *(i) Vijay Dhanuka v. Najima Mamtaj [2014 ALL MR (Cri.) 1924 (SC)]*, *(ii) Netcore Solutions Pvt. Ltd. v. Pinnacle Teleservices Pvt. Ltd. [2013 ALL MR (Cri.) 1377]*, *(iii) Vimal Powerloom v. Ravi Agency [2014 ALL MR (Cri.) 1696]* and *(iv) Chandrakant Tanhaji Pawar v. State of Maharashtra [2014 ALL MR (Cri.) 1059]*.

18. Before analysing the contentions raised by the learned counsel for the applicant and referring to the judgments cited in support thereof, it would be pertinent to embark upon the relevant provisions of Sections 200 and

202 of the Code of Criminal Procedure, 1873, which reads as under:

“Section 200 Cr.P.C. 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.

202. Postponement of issue of process:

(1) Any Magistrate, on receipt of a complaint of an offence which he is authorised to take cognizance or which has been made over to him under [section 192](#), may, if he thinks fit, 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) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness 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 Court on an officer in charge of a police station except the power to arrest without warrant.

19. The object of Section 200 is to test whether the complaint makes out sufficient ground for the purpose of issuing process. The amended sub-section (1) of Section 202 Cr.P.C makes 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 such other person as he thinks fit, for finding out whether or not there is sufficient ground to proceed against the accused. The object of such inquiry is to ensure that innocent persons residing beyond the jurisdiction

of the Magistrate are not harassed by unscrupulous persons by filing false or vexatious complaints. It casts a duty on the magistrate to arrive at a prima facie satisfaction whether or not there is sufficient ground to proceed against the accused residing beyond his jurisdiction.

20. The Apex Court in *Vijay Dhanuka* (supra), while considering the scope of the section has held that Section 202 of Cr.P.C. inter alia, contemplates postponement of the issue of the process “in a case where the accused is residing at the place beyond the area in which he exercises his jurisdiction” and thereafter to either enquire 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. The Apex Court has held that the amendment of Section 202 Cr.P.C. was necessitated as false complaints were filed against persons residing at far off places in order to harass them. Considering the purpose for which the amendment has been brought, the Apex Court held that an 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.

21. In the case of Chandrakant Tanaji Pawar (supra) this court had set aside the order of issuance of process for offence under Section 494 and 495 r/w. 109 of IPC for not holding an enquiry under Section 202 and had directed the Magistrate to deal with the complaint in accordance with law keeping in mind the provisions of Section 202 of Cr.P.C.

22. It is pertinent to note that in ***Bansilal S. Kabra v. Global Trade Finance Ltd. [2010 ALL MR (Cri) 3168]*** this Court (V.M.Kanade, J.) while considering the applicability of the provisions of Section 202 of Cr.P.C. to the complaints filed under Section 138 of the N.I.Act this court has held that the inquiry which has to be made in complaint filed under Section 138 N.I.Act is very limited to certain documents and averments in the complaint. It is held the mandate of Section 202 of Cr.P.C. if made applicable to the complaints filed under Section 138 of N.I.Act would defeat the very purpose behind the enactment of Section 138 of the N.I. Act. Thus, upon considering and analyzing the object and ambit of Section 138 of the N.I.Act vis-à-vis the object of sub-section (1) of Section 202 of Cr.P.C. the learned Judge of this Court has observed as follows :

“I am of the view that the said provision may not apply to the provisions of Negotiable Instruments Act and merely because the accused reside outside the jurisdiction of the court, in each and every case it is not

necessary for the Magistrate to postpone the issuance of process. The Magistrate, in my view, can exercise his discretion and decide whether to issue process, dismiss the complaint after recording the verification of the complainant and his witnesses, if any, or postpone the issuance of process and in a given case hold a further inquiry, depending on facts and circumstances of each case and non-compliance of the said provision would not vitiate the issuance of process if there is material to indicate that there has been an application of mind on the part of the Magistrate after going through the verification and other material brought on record by the complainant”.

Considering the pendency of large number of applications under Section 482 of Cr.P.C. for quashing the process for non compliance of provisions of Section 202 of Cr.P.C., and in order to avoid conflicting judgments the learned Judge of this court held that this important issue needs to be finally resolved by the division bench or the larger bench of this court.

23. In the case of ***Vinod V. SBI Global Factors Ltd. [2011 (4) Mh.LJ 282]***, this Court has taken a similar view and concurred with the judgment in the case of Bansilal S.Kabra (supra).

24. It is however to be noted that in ***Netcore Solutions Pvt. Ltd. vs. Pinacle Teleservices Pvt. Ltd. [Writ Petition No.138 of 2011]*** which was also in respect of complaint under Section 138 of N.I.Act a coordinate bench of this Court, relying upon the decision of the Apex Court in

K.T.Joseph vs. State of Kerala [(2009) 15 SCC 197], Nilu Chopra & Anr. vs. Bharti [(2009) 10 SCC 184] and the judgment of this Court in ***S.C.Mathur (Capt.) & Anr. vs. Elektronik Lab & Ors. [2010(8) LJ Soft 103]*** has held the enquiry under Section 202 is mandatory.

25. In ***Netcore Solutions Pvt.Ltd. vs. Pincale Teleservices Pvt. Ltd. [2013 ALL MR (Cri.) 1377]*** the Magistrate had not held enquiry as directed in Writ Petition No.138 of 2011. Hence, the order of issuance of process under Section 138 of N.I.Act was set aside and the learned Magistrate was directed to exercise discretion in accordance with the mandate of the provisions of Section 202 of Cr.P.C.

26. In ***Vimal Powerloom vs. Ravi Agency & Anr. [2014 ALL MR (Cri) 1696]***, the Magistrate had not complied with the amended provision of Section 202 of Cr.P.C in a complaint under Section 138 of the N.I.Act. The co-ordinate bench of this Court has held as follows :

“ the various decisions rendered by this Court show that this court has held that the provisions of Section 202 as amended is mandatory in nature. Thus the courts are following the amended provisions in the State. In the case of Oman Bank cited supra, it is laid down that it is mandatory provision and procedure needs to be followed by JMFC. In view of this position of law, this court

holds that the order of issue process passed by the JMFC, without following the aforesaid procedure cannot sustain in law. The Magistrate needs to follow the procedure with only object, to ascertain the truth in the allegations made and only prima facie case is required to be made out. The scope of the enquiry under Section 202 of Cr.P.C. is very limited. It is also required to keep in mind the relevant provisions of N.I.Act like Section 118 and 139 raise some presumptions. The witnesses like bank officers are not required to be examined to prove bank documents. Similarly, in respect of other evidence, the postal endorsement on the notice, there are presumptions under Section 27 of General Clauses act and those presumptions can be kept in mind by the JMFC. Thus the scope of enquiry, which may be made by the Magistrate is very limited. In such a case to send the matter to police even for limited purpose of investigation is not desirable.”

With these observations, the process was set aside and the matter was remanded with directions to follow the procedure laid down by Section 202 of Cr.P.C.

27. It is pertinent to note that the decisions of the Apex Court in ***Vijay Dhanuka vs. Najima Mamitaj***, ***K.T.Joseph vs. State of Kerala***, and ***Bank of Oman vs. Bakara Abdul Aziz*** and the decision of this court in ***Chandrakant Pawar vs. State of Maharashtra (Supra)*** relate to the offences under IPC. In the instant cases the process is issued under section 138 N.I.Act and the principal question for consideration is whether it is

obligatory to the Magistrate to comply with the provisions of sub section (1) of section 202 Cr.P.C. in the complaints under section 138 NI Act. Apparently the coordinate benches of this court have rendered conflicting views on the question. It is true that the reference is pending and controversy will be finally resolved in the said reference, but until such time it is apposite to follow the view which is in conformity with the scheme of the Act.

28. It is therefore imperative to consider the scope and ambit of section 138 and other amended provisions of the Negotiable Act. It may be mentioned that Chapter XVII - comprising of Section 138 to 142, was inserted in the N.I.Act, with effect from 1-4-1989. The object of bringing Sections 138 to 142 of N.I. Act on statute, as reiterated by the Apex Court in ***Indian Bank Association v. Union of India [(2014) 5 SCC 590]*** was :

“ to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Despite civil remedy, Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a book and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly. It is seen that once the cheque has been drawn and issued

to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the bank for non-payment and the cheque is returned to the payee with such an endorsement, it amounts to dishonour of cheque and it comes within the meaning of Section 138.”

29. These amended provisions could not achieve the desired result, which necessitated the parliament to make changes in existing provisions and further introduce Sections 143 to 147 by the Negotiable Instruments (Amendment & Miscellaneous Provisions) Act, 2002, which came into force with effect from 6-2-2003. By this Act, Sections 138, 141, and 142 were amended and Section 143 to 147 were introduced with an aim to ensure expeditious disposal of cases relating to dishonour of cheques, which are found to have clogged the criminal justice system. Further to address the difficulties faced by the payee or the lender of the money in filing the case under Section 138 of the said Act, by the Negotiable Instruments (Amendment) Act, 2015 Section 142 has been amended and Section 142A has been inserted to define the territorial jurisdiction for offence under Section 138 of the Act.

30. It is thus clear that the Act has been amended from time to time to ensure smooth functioning of business transactions and to restore the

sanctity and credibility of issuance of cheques in commercial transaction by speedy trial and expedient disposal of cases under Section 138 of the N.I.Act. The object of the Act cannot be ignored while deciding whether the rigors of the amended provisions of Section 202 Cr.P.C. are applicable to the offence under Section 138 of the Negotiable Act, which reads as under:

Section 138. Dishonour of cheque for insufficiency etc., of fund 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 provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

31. This Section spells out the ingredients of the offence and provides the penalty for such offence on fulfillment of the conditions stipulated in the proviso. The Apex Court in ***Kusum Ingots & Alloys v. Pennar Peterson Securities Ltd. & Ar. [(2000) 2 SCC 745]*** has summed up the essential ingredients of the offence under Section 138 of the N.I.Act as under :

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;

(iii) that cheque is returned by the bank unpaid. either because of the amount of money standing to the credit of the 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 the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) *the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;*

32. Section 142 deals with cognizance of offences. The said provision reads as under:

Section 142.- Cognizance of offences-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138.

[provided that the cognizance of the complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period]

(c) No Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.

"(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction-

a. If the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is

situated; or

b. If the cheque is presented for payment by the payee or holder in due course otherwise through an account, the branch of the drawee bank where the drawer maintains the account, situated.

Explanation: For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account".

Section 143.-Power of Court to try cases summarily-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) all offences under this Chapter shall be tried by a Judicial Magistrate , of the first class or by a Metropolitan Magistrate and the provision of Section 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials.

Provided that in the case of any conviction in a summary trial under this Section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees:

Provided further that when at the commencement of, or in the course of a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

(2) The trial of a case under this section shall, so far as practicable consistently with the interest of justice, be continued from day to day until the conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.

(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint.

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 proceedings 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.

Section 146. Bank's slip prima facie evidence of certain facts:-

The Court shall, in respect of every proceedings under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved.

33. Upon analyzing the relevant provisions of the Act it is clear that Section 138 of the Act spells out the ingredients of the offence as well as the conditions required to be fulfilled before initiating the prosecution.

These ingredients and conditions are to be satisfied mainly on the documentary evidence keeping in mind the presumptions under section 118 and 139 of NI Act and section 27 of General Clauses Act as well as the provisions of section 146 of the Act.

34. The provisions of Section 142 to 147 lay down a Special Code for the trial of offences under the Chapter XVII of the N.I. Act. While considering the scope and ambit of the amended provisions of the Act the Apex Court in ***Mandvi Co. Op. Bank Ltd. v. Nimesh B. Thakore [(2010) 2 SCC (Cri.) 1]*** has held that the provisions of Section 143, 144, 145 and 147 expressly depart from and override the provisions of the Code of Criminal Procedure, the main body of adjective law for criminal trials. The Apex Court has held that :-

“It is not difficult to see that sections 142 to 147 lay down a kind of a special code for the trial of offences under Chapter XVII of the Negotiable Instruments Act and sections 143 to 147 were inserted in the Act by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to do away with all the stages and processes in a regular criminal trial that normally cause inordinate delay in its conclusion and to make the trial procedure as expeditious as possible without in any way compromising on the right of the accused for a fair trial.”

35. A plain reading of the above provisions clearly indicate that section 142 of the Negotiable Instrument underlines the procedure for taking cognizance of offences under the Act. Departing from the general rule that the criminal law can be set in motion by any person either by written complaint or oral information, the provision of section 142 of the Act mandates that the complaint under section 138 N.I.Act should be in writing and should be filed and signed by the payee or the holder in due course, as the case may be, before the concerned court. There is thus no scope to refer the case for police investigation or enquiry. The exception engrafted in section 142 serves as a safeguard against false and frivolous complaints and thus eliminates the need to hold a preliminary enquiry contemplated by section 202 Cr.P.C.

36. It is also pertinent to note that as a general rule Section 200 mandates examination on oath of the complainant and the witnesses present, if any, and section 202 mandates an enquiry or investigation by the police or by any other person. However, Section 145 with its non-obstante clause dispenses the need for examination of the complainant and the witnesses on oath and enables the magistrate to issue process on the basis of

the affidavit filed in support of the complaint under section 138 N.I.Act,. Section 145 of the Act therefore is an exception to the general rule as envisaged in Section 200 202 of the Code.

37. In *Indian Bank Association and Ors. Vs. Union of India & Ors. [(2014) 5 SCC 590]*, the Apex Court inter alia held that that under Section 145 of the Act, the complainant can give his evidence by way of affidavit and such affidavit shall be read in evidence in an enquiry, trial or other proceedings in the court, which makes it clear that the complainant is not required to examine himself onwards i.e. once after filing the complaint and once after summoning of the accused. The affidavit and 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 post-summoning stage. The Apex Court has held that Amendment Act, 2002, is to be given effect to in its letter and spirit and has issued several directions. The relevant direction which deals with the issue is set out as under:

“The Metropolitan Magistrate/Judicial Magistrate (MM/JM) on the date when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and

the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons. ...”

38. In the case of ***Rajesh Chalke v. State of Maharashtra [2011(1) Mh.L.J. 244]***, the issue before the full bench of this Court was whether in view of the provisions of Section 145 of N.I.Act, the Metropolitan Magistrate or Judicial Magistrate, First Class, taking up a complaint under Section 138 of the N. I. Act, along with documents in support thereof and the verifications made in the affidavit in support of the complaint, is still obliged to examine on oath the complainant and his witnesses before issuing process on the complainant. The full bench of this Court after considering the object of Section 138 of N.I.Act vis-a-vis the provisions of Section 145 of N. I. Act and 200 of Cr. P. C. has held that :

“35. After addition of Section 145 NI Act in the statute book, it is open to the Magistrate to issue process on the basis of the contents of the complaint, the documents in support thereof and the affidavit submitted by the complainant in support of the complaint. Once the complainant files an affidavit in support of the complaint before issuance of the process under Section 200 Cr.P.C, it is thereafter open to the Magistrate, if he thinks it fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. But then it is a matter of discretion and the Magistrate is not bound to call upon the complainant to remain

present before the Court and to examine him upon oath for taking decision whether or not to issue process on the complaint under Section 138 of NI Act.”

39. The dictum laid down by the Apex Court in Indian Bank Association (supra) and the Full Bench of this court in Rajesh Chalke (supra) makes it clear that in the complaints under section 138 NI Act, the Magistrate is not obliged to examine the complainant under section 200 Cr.PC and can rely on affidavit filed along with the complaint. The Magistrate can take cognizance and issue summons if upon scrutinizing the complaint, the affidavit and the documents he is satisfied that prima facie offence has been made out against the accused.

40. It is also pertinent to note that the Negotiable Instruments (Amendment) Act, 2015 defines and restricts the territorial jurisdiction to a court specified in Section 142 (2) (a) and (b) of the Act. The said issue of territorial jurisdiction which has to be decided on the basis of the documents, eliminates the need for further inquiry on jurisdictional issue. It therefore follows that the Magistrate can arrive at the requisite satisfaction about the essential ingredients of the offence including the issue of territorial jurisdiction at the end of the enquiry under Section 200

Cr.P.C itself and this obviates the need of holding further enquiry under Section 202 Cr.P.C. This being the position further enquiry under sub section (1) of Section 202 of the Code, if held to be mandatory in complaints filed under Section 138 N.I.Act, will be nothing but ritualistic, idle and an empty formality.

41. It may be mentioned that the decision of the full bench of this court in Rajesh Chalke (supra_ was not brought to the notice of the learned Single Judge in Netcore (Cri. Writ Petition No. 138 of 2011). Similarly, the decision of the Apex Court in M/s. Indian Bank Associates (supra) as well as the decision of the full bench of this court in Rajesh Chalke were not brought to the notice of the learned single judge in Vimal Powerloom (supra). Consequently, the learned Single Judges of this Court had no occasion to consider the principles laid down by the Apex Court as well as the full bench of this Court in the aforesaid decisions. These two decisions therefore cannot be considered as binding precedents. In any case, upon consideration of the decision in Indian Banks Association (supra) and Rajesh Chalke (supra) it would be appropriate to follow the decision in Bansilal Kabra (supra), and Vinod vs. SBI Global (supra).

42. It is also pertinent to note that Section 143 of the Act empowers the Court to try cases under the Act summarily and thus, reinforces that every trial shall be conducted as expeditiously as possible. Sub-section (3) of Section 143 mandates that the trial would proceed, as far as practicable, on a day-to-day basis and sub-section (4) of the section requires the Magistrate to make the endeavour to conclude the trial within six months from the date of filing of the complaint. Section 144 makes the process of service of summons simpler and cuts down the long time ordinarily consumed in service of summons. whereas Section Section 146 contemplates that bank slip or memo having official mark denoting that the cheque has been dishonoured, shall constitute prima-facie evidence of dishonour of the cheque, unless and until, such fact is disapproved. The legislature has inserted these provisions and has provided a special procedure with an object of expeditious disposal of the cases under section 138 of the Act. The very object of the Act will stand defeated if the enquiry under subsection (1) of section 202(1) of Cr,P.C. is held to be mandatory in complaints under section 138 of N.I.Act.

43. The decisions in case of Bansilal (supra) and Vinod (supra) holding

that compliance with the provision of Section 138 of N.I. Act is only directory and not mandatory is in accord with the scheme of the N.I. Act and the legislative intent that such complaints are disposed of in expeditious manner. It may be mentioned that the Apex court in the case of *National Insurance Co. Ltd. vs, Saju P. Paul & Anr. [(2013) 2 SCC 41]* has held that the pendency of the reference before a larger bench is no bar to follow the judgment under the reference. Therefore, following the view in the said case, the impugned order cannot be interfered with for the non-compliance of the provisions of Section 202 of Cr.P.C.

44. Under the circumstances and in view of discussion supra, the applications have no merit and are accordingly dismissed. Rule is discharged.

(ANUJA PRABHUDESSAI, J.)