

HIGH COURT OF CHHATTISGARH, BILASPURCriminal Misc. Petition No.222 of 2014

Sanjay Verma, S/o Permashwar Lal Verma, aged about 48 years, R/o Alankar Jewellers, Jairam Complex, G.E. Road, Raipur, Police Station Lower Bazar, Raipur (C.G.)

---- Petitioner

Versus

Ashoka Brother, through Director Sanjay Maheshwari, S/o Shri Satyanarayan Maheshwari, aged about 38 years, R/o Ganj Line, Ward No.24, Rajnandgaon (C.G.)

---- Respondents

For Petitioner: Mr. Yash Mourya, Advocate.

For Respondent: Mr. R.N. Jha, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

20/06/2019

1. The complainant / respondent herein laid a complaint for commission of offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the NI Act') against the petitioner herein in which the learned trial Magistrate took cognizance of the offence under Section 138 of the NI Act on 23-1-2008 and issued process to the petitioner herein. The petitioner herein after appearing before the said Court filed an application on 29-4-2013 for dismissing the complaint which the learned trial Magistrate did not found favour with and rejected the same by order dated 1-6-2013 which was affirmed by the revisional Court in revision taken by the petitioner herein. Now, both the orders have been made subject matter of this petition under Section 482 of the CrPC.

2. Mr. Yash Mourya, learned counsel appearing for the petitioner, would raise two fold submissions: -

1. The learned trial Magistrate could not have taken cognizance of the offence under Section 138 of the NI Act without complying with the mandate of Section 200 of the CrPC and examining the complainant on solemn affirmation.
2. The petitioner / accused being resident of the area outside the territorial jurisdiction of the learned Magistrate who has issued process to him, therefore, enquiry within the meaning of Section 200 of the CrPC was mandatory, that was not done and therefore the order taking cognizance and issuing of process deserve to be set aside.

3. Mr. R.N. Jha, learned counsel appearing for the respondent / complainant, would submit as under: -

1. Once the process was issued and cognizance was taken by the learned Magistrate for offence under Section 138 of the NI Act, the said Magistrate is wholly jurisdiction-less to review, recall or reconsider his decision of the order taking cognizance and issuing process and the only remedy of the accused person is either to file revision petition or to file petition under Section 482 of the CrPC before this Court.
2. The two points raised by the petitioner with regard to mandatory examination of the complainant before taking cognizance and making enquiry under Section 200(2) of the CrPC were considered by the Supreme Court in the matter of **K.S. Joseph v. Philips Carbon Black Ltd. and another**¹

¹ AIR 2016 SC 2149

and answered against the petitioner and squarely covered by that decision in his favour and therefore the petition deserves to be dismissed.

4. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
5. In K.S. Joseph (supra), the Supreme Court has considered the plea of examination of the complainant on oath before taking cognizance of offence under Section 138 of the NI Act and thereafter negated the plea in light of Section 145 of the NI Act holding that Section 145 being non obstante clause overrides the requirement of examination of the complainant on solemn affirmation under Section 200 of the CrPC and held as under: -

“4. The non obstante clause in sub-section (1) of Section 145 is self-explanatory and over-rules the requirement of examination of the complainant on solemn affirmation under Section 200 of the Cr.P.C. Now the complainant is entitled to give his evidence on affidavit and subject to all just exceptions, the same has to be read in evidence in any enquiry, trial or other proceeding under the Cr.P.C. This view is also supported by the judgment of this Court in the case of *Mandavi Co-operative Bank Ltd. v. Nimesh B. Thakore*². No doubt this judgment was in a different factual scenario but this Court went into details of the amendment of 2002 including Section 145 and in paragraph 18 it also noted the Statement of Objects and Reasons appended to the Amendment Bill. Inter alia, the objects included “to prescribe procedure for dispensing with preliminary evidence of the complainant”.”

6. In view of the above, I have no slightest hesitation to hold that such an examination is not at all required in a complaint filed for offence punishable under Section 138 of the NI Act in view of the provisions contained in Section 145(1) of the NI Act and in view of the

² (2010) 3 SCC 83

mandate of the Supreme Court in K.S. Joseph (supra).

7. Turning to the next plea that since the accused / petitioner is resident of Raipur, which is outside the territorial jurisdiction of the learned Magistrate, therefore, enquiry under Section 200(2) of the CrPC was mandatory. This has also been turned down by Their Lordships of the Supreme Court in K.S. Joseph (supra) holding that in view of Section 145 of the NI Act, complainant's evidence on affidavit will also be permissible for the purpose of such enquiry. It was observed as under: -

“7. The amendment has a purpose in requiring the concerned Magistrate to postpone the issue of process against the accused if he is residing at a place beyond the area of his jurisdiction and to hold an enquiry or direct an investigation by a police officer or any other person for the purpose of deciding whether or not there is sufficient ground for proceeding. It is to avoid unnecessary harassment to the proposed accused. In such an enquiry, the Magistrate may take evidence of witness on oath but in view of Section 145 of the Act, complainant's evidence on affidavit will also be permissible for the purpose of such enquiry.”

8. As such, such an enquiry was not necessary relating to the case of the Negotiable Instruments Act, 1881. It is answered accordingly.
9. At this stage, Mr. Jha, learned counsel appearing for the respondent, would submit that in a three-Judges Bench decision of the Supreme Court in the matter of Subramaniam Sethuraman v. State of Maharashtra and another³, the Supreme Court relying upon its earlier decision in the matter of Adalat Prasad v. Rooplal Jindal⁴ has held that issuance of process under Section 204 of the CrPC is a preliminary step in trial and same cannot be reviewed, reconsidered or recalled by the Magistrate, there being no provision

³ (2004) 13 SCC 324

⁴ (2004) 7 SCC 338

therefor in the Code. Only remedy available to an aggrieved accused is the extraordinary remedy under Section 482 of the CrPC and not by way of application to recall the summons or to seek discharge, the latter not being contemplated in trial of a summons case. It was observed in Subramaniam Sethuraman (supra) as under: -

“14. In *Adalat Prasad case*⁴, this Court considered the said view of the Court in *K.M. Mathew case*⁵ and held that the issuance of process under Section 204 is a preliminary step in the stage of trial contemplated in Chapter XX of the Code. Such an order made at a preliminary stage being an interlocutory order, same cannot be reviewed or reconsidered by the Magistrate, there being no provision under the Code for review of an order by the same court. Hence, it is impermissible for the Magistrate to reconsider his decision to issue process in the absence of any specific provision to recall such order. In that line of reasoning this Court in *Adalat Prasad case*⁴ held: (SCC p. 343, para 16)

"Therefore, we are of the opinion, that the view of this Court in *Mathew case*⁵ that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law".

17. As observed by us in *Adalat Prasad case*⁴ the only remedy available to an aggrieved accused to challenge an order in an interlocutory stage is the extraordinary remedy under Section 482 of the Code and not by way of an application to recall the summons or to seek discharge which is not contemplated in the trial of a summons case.”

10. As such, the petitioner's application for dismissing the complaint after taking cognizance was not at all maintainable in view of the principles of law laid down by the Supreme Court in the above-stated judgments.
11. Mr. Mourya brought to the notice of this Court the decision rendered by this Court in the matter of Sudhanshu Kumar v. Vijay Kumar

⁵ K.M. Mathew v. State of Kerala, (1992) 1 SCC 217

Jaiswal⁶. In that case, the decision rendered by the Supreme Court in K.S. Joseph (supra) was not brought to the notice of this Court. He also brought to the notice of this Court the decision rendered by a coordinate Bench of this Court in the matter of Raj Kumar Singhania v. Ashok Jain⁷ which is of no help to the petitioner in view of the decision of the Supreme Court in K.S. Joseph (supra).

12. In view of the above, I do not find any merit in either of the pleas raised by learned counsel for the petitioner, as such, the petition under Section 482 of the CrPC deserves to be and is accordingly dismissed.

13. Record of the trial Court be sent back forthwith for concluding the trial expeditiously.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma

⁶ Cr.M.P.No.728/2014, decided on 10-4-2019

⁷ 2012 Cri.L.J. 2254