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

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Date of Decision: 06.12.2019

+ **WP(CRL.) 3417/2019 & CRL. M.A. 42101/2019**

SUMIT PRATAP

..... Petitioner

Through: Mr. Anil Kaushik, Mr. Abhishek Mishra and Mr. Akash Bhardwaj, Advocates.

Versus

ICICI BANK LTD & ANR.

.....Respondents

Through: Mr. Puneet Kumar Bhalla, Adv. for respondent No. 1.
Mr. R.S. Kundu, A.S.C. for the State with Mr. Hitesh Vali and Bhagat Singh, Advocates.
SI Sanjeev Kumar- P.S. Paharganj, Delhi.

CORAM:

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

RAJNISH BHATNAGAR J. (ORAL)

CRL. M.A. 42102/2019

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

WP(CRL.) 3417/2019 & CRL. M.A. 42101/2019

1. Issue notice. Ld. A.S.C. for the State who appears on advance notice, accepts notice. Ld. counsel for the respondent No. 1 who also appears on advance notice, accepts notice.
2. The present Writ Petition has been filed by the petitioner under articles 226 & 227 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1973 for quashing of the criminal complaint bearing CC No. 5939 of 2019 titled as "ICICI Bank Ltd. Versus Sumit Pratap" pending before the Court of Ld. Metropolitan Magistrate Ms. Tapasya Agarwal, Central District, Tis Hazari Courts, Delhi and all other proceedings initiated out of the said complaint including the order dated 03.06.2019.
3. Briefly stated the facts of the case are that in the year 2015 the petitioner booked a flat which was proposed to be part of the project named "Victory Ace" at Gautam Budh Nagar, UP (hereinafter called "the project") floated by M/s Dream Procon Pvt. Ltd. (hereinafter called "the builder"). The builder allotted flat bearing No. 2701, Tower A1, Unit Type (Spade B) 3 BHK + 2T measuring 1495 Sq. feet and in pursuance thereof the builder and the petitioner entered into an allotment agreement according to which the total sale consideration for the said flat was Rs. 68,99,425/- and the same was a construction linked payment plan.
4. After the issuance of the allotment letter, the petitioner entered into a tri-partite loan agreement dated 27.08.2015 with the builder and respondent No. 1. As per the Tri-partite loan agreement, even though

petitioner is termed as the allottee/borrower", the agreement dated 27.08.2015, is in the form of a Project financing agreement between the builder and the respondent No. 1 Bank and it is the builder who is liable to pay any amount advanced by the bank to the builder. The agreement stipulates that upon the transfer of the flat or upon termination of the allotment agreement, it is the builder who is liable to pay any such amount of money advanced by the bank.

5. According to the petitioner after the execution of the agreement dated 27.08.2015, the bank started disbursing funds directly to the builder in advance which were in excess of what has been stipulated in schedule B to the agreement dated 27.08.2015, which was in contravention of the agreement as the builder did not adhere to the construction schedule, as prescribed and agreed to between the parties. Since the builder did not comply with the agreed timeline of construction and was not in a position to deliver the possession of the flat as construction activities had come to a halt and the builder had abandoned the project, so the petitioner vide letter dated 03.10.2018, terminated the allotment agreement and tri-partite loan agreement dated 27.08.2015 and the fact of termination of the allotment agreement and the surrender of the flat was also communicated to respondent No. 1 bank vide e-mail dated 04.10.2018.

6. According to the petitioner, as per the tri-partite agreement dated 27.08.2015, upon termination the builder was obligated to either refund the money to respondent No. 1 bank or enter into a fresh tri-partite agreement with a new prospective buyer. However, the respondent No.

1 bank, instead of pursuing its remedies against the builder, with a malafide intent of unjustly enriching itself presented cheque No. 355083 of Rs. 17,00,000/- dated 04.04.2019 for encashment in its own branch at Jhandewalan Extension, New Delhi, which was one of few cheques issued by the petitioner to respondent No 1 bank as security, in fact the amount claimed by the respondent No. 1 was neither payable, nor due and not a legally enforceable debt.

7. Subsequently, on 12.05.2019, respondent No. 1 filed a criminal complaint bearing CC No. 5939 of 2019 under section 138 of the Negotiable Instruments Act against the petitioner. The Ld. Trial Court vide impugned order dated 03.06.2019 issued summons vide a common order against different accused in different complaints arising out of separate transactions.

8. It is further the case of the petitioner that National Company Law Tribunal, New Delhi ("NCLT") vide order dated 06.09.2019, passed in Insolvency Petition bearing No. IB1771/(ND)/2018 titled as "Priyanshi Arora Vs. M/s Dream Procon Pvt. Ltd." initiated Corporate Insolvency Resolution Process (CIRP) against the builder and an Interim Resolution Professional (IRP) has already been appointed. The IRP vide notice dated 17.10.2019, invited the creditors of the builder to submit their claims. According to the petitioner, he has also filed a petition bearing No. IB1628/(ND)/2018 titled as "Sumit Pratap & Ors Vs. M/s Dream Procon Pvt. Ltd." under Section 7 of the Insolvency and Bankruptcy Code, 2016.

9. According to the petitioner, the continuation of the criminal proceedings against him infringes on his right to liberty under Article 21 of the Constitution of India, as he is a victim of fraud perpetuated by builder and the petitioner has been wrongfully arrayed as an accused for an amount which is recoverable from the builder.

10. It is further the case of the petitioner that in view of the order dated 06.09.2019, passed by the NCLT, the respondent No. 1 can submit its claim against the builder to the IRP and the petitioner cannot be arrayed as an accused at the behest of the officials of the respondent No.

11. According to the petitioner, the builder has acted in collusion as firstly the bank disbursed excess funds in advance without the builder complying with construction schedule and secondly instead of pursuing its remedies against the builder as per the terms of tri-partite agreement date 27.08.2015, the respondent No. 1 initiated criminal proceedings against the petitioner with a malafide intent to extort money, hence this petition.

12. It is urged by the counsel for the petitioner that upon the termination of tripartite agreement dated 27.08.2015, it was the builder who was suppose to refund the money to respondent No. 1 bank or enter into a fresh tripartite agreement with a new perspective buyer. It is submitted that the respondent No. 1 fraudulently presented the cheque in question which was one of the few cheques issued by the petitioner to respondent No. 1 as security and it is not a legal enforceable debt.

13. On the other hand, the counsel for the respondent No. 1 who appears on advance notice submitted that there is no illegality in the

impugned order dated 03.06.2019 and the petitioner can take all his defences during the course of trial and an offence U/s 138 NI Act is technical in nature and defences which the petitioner can take are inbuilt.

14. Coming to the legal position and taking into consideration the various provisions of Cr.PC which have been discussed in various judgments time and again demonstrate that the Negotiable Instruments Act, provides sufficient opportunity to a person who issues the cheque. 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 is bound to face the criminal trial and consequences. It is seen in many cases that the petitioners with malafide intention and to prolong the litigation raise false and frivolous pleas and in some cases, the petitioners do have genuine defence, but instead of following due procedure of law, as provided under the NI Act and the Cr.PC, and further, by misreading of the provisions, such parties consider that the only option available to them is to approach the High Court and on this, the High Court is made to step into the shoes of the Metropolitan Magistrate and examine their defence first and exonerate them. The High Court cannot usurp the powers of the Metropolitan Magistrate and entertain a plea of accused, as to why he should not be tried under Section 138 of the NI Act. This plea, as to why he should not be tried under Section 138 of the NI Act is to be raised by the accused before the Court of the Metropolitan Magistrate under Section 251 of the Cr.PC & under Section 263(g) of the Cr.PC. Along with this plea, he can file necessary documents and also make an

application, if he is so advised, under Section 145(2) of the NI 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.

15. An offence under Section 138 of the NI Act is technical in nature and defences, which an accused can take, are inbuilt; for instance, the cheque was given without consideration, the accused was not a 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 the Indian Evidence Act, 1872. Since the mandate of the legislature is the 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 the NI Act and has to be read during the trial. The witnesses i.e. the complainant or other witnesses can be recalled only when the accused makes such an application and this application must disclose the reason why the accused wants to recall the witnesses and on what point the witnesses are to be cross examined

16. The offence under Section 138 of the NI Act is an offence in the personal nature of the complainant and since 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 the 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. 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. 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.

17. Sections 143 and 145 of the NI 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 affidavits 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.

18. In view of the procedure prescribed under the Cr.PC, if the accused appears after service of summons, the learned Metropolitan Magistrate shall ask him to furnish bail bond to ensure his appearance during trial and ask him to take notice under Section 251 Cr.PC 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 NI Act for

recalling a witness for cross-examination on plea of defence. If there is an application u/s 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. Once the summoning orders in all these cases have been issued, it is now the obligation of the accused to take notice under Section 251 of Cr. PC., if not already taken, and enter his/her plea of defence before the concerned Metropolitan Magistrate's Court and make an application, if they want to recall any witness. If they intend to prove their defence without recalling any complainant witness or any other witnesses, they should do so before the Court of Metropolitan Magistrate.

19. Now, coming to the jurisdiction, suffice it to say that the Court, in exercise of its jurisdiction under Section 482 Cr.PC. cannot go into the truth or otherwise of the allegations made in the complaint or delve into the disputed question of facts. The issues involving facts raised by the petitioner by way of defence can be canvassed only by way of evidence before the Trial Court and the same will have to be adjudicated on merits of the case and not by way of invoking jurisdiction under Section 482 Cr.PC. at this stage.

20. In ***Rajiv Thapar & Ors. V. Madan Lal Kapoor***, (2013) 3 SCC 330, it has been held by the Supreme Court as under:

“28. The High Court, in exercise of its jurisdiction under Section 482 of the Cr.P.C., must make a just and rightful

choice. This is not a stage of evaluating the truthfulness or otherwise of allegations levelled by the prosecution/complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused is. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/ complainant, it would be impermissible to discharge the accused before trial. This is so, because it would result in giving finality to the accusations levelled by the prosecution/ complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same. The converse is, however, not true, because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The accused would still be in a position to succeed, by establishing his defences by producing evidence in accordance with law. There is an endless list of judgments rendered by this Court declaring the legal position, that in a case where the prosecution/ complainant has levelled allegations bringing out all ingredients of the charge(s) levelled, and have placed material before the Court, prima facie evidencing the truthfulness of the allegations levelled, trial must be held.

29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, in as much as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care

and circumspection. To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.”

21. Upon analyzing the provisions of the NI 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.

22. These ingredients and conditions are to be satisfied mainly on the basis of documentary evidence, keeping in mind the presumptions under Sections 118 and 139 of the NI Act and Section 27 of the General Clauses Act, 1897 as well as the provisions of Section 146 of the Act.

23. The provisions of Sections 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 Supreme Court in *Mandvi Co. Op. Bank Ltd. v. Nimesh B. Thakore* , AIR 2010 SC 1402, has held that the provisions of Sections 143, 144, 145 and 147 expressly depart from and override the provisions of the Cr.PC, the main body of adjective law for criminal trials. The Supreme Court has further held as under:-

"17. 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."

24. The parameters of the jurisdiction of the High Court, in exercising jurisdiction under Section 482 Cr.PC, are now almost well-settled. Although it has wide amplitude, but a great deal of caution is also required in its exercise. The requirement is, the application of well known legal principles involved in each and every matter. Adverting back to the facts of the present case, this Court does not find any material on record which can be stated to be of sterling and impeccable quality warranting invocation of the jurisdiction of this Court under Section 482 Cr.PC at this stage. More so, the defence as raised by the petitioner in the petition requires oral as well as documentary evidence, which cannot be appreciated, evaluated or adjudged in the proceedings under Section 482 of Cr.PC.

25. Accordingly, I find no flaw or infirmity in the proceedings pending before the Trial Court. However, the Trial Court shall certainly consider and deal with the contentions and the defence of the petitioner in accordance with law.

26. The prayers are untenable in law. Accordingly, the petition is dismissed and CRL. M.A. 42101/2019 is also disposed of accordingly.

RAJNISH BHATNAGAR, J.

DECEMBER 06, 2019

Sumant



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