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

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Date of Decision: 8th February, 2019

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CRL.M.C. 6466/2018 & CRL.M.C. 6519/2018

MS. SHASHI ADLAKHA

..... Petitioner

Through: Mr. Ashok Tobria and
Mr. Pradeep Kumar Pathak,
Advts.

versus

HOUSING DEVELOPMENT FINANCE CORPORATION LTD.

..... Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE CHANDER SHEKHAR

CHANDER SHEKHAR, J. (ORAL)

CRL.M.A. 50293/2018 (exemption) in CRL.M.C.6519/2018

1. Exemption allowed, subject to all just exceptions.
2. The application is disposed of.

CRL.M.C. 6466/2018 & CRL.M.A.50073/2018 (for stay)

CRL.M.C. 6519/2018 & CRL.M.A.50292/2018 (for stay)

1. The petitioner has filed the present petitions under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.' in short) for quashing of criminal proceedings in Criminal Case Nos.59787/2016 and 59793/2016, both under Section 138 of the Negotiable Instruments Act, 1881 ('NI Act', in short) titled "*Housing Development Finance Corporation Ltd. v. Ms.Shashi Adlakha*" pending before the Metropolitan Magistrate (NI Act), Patiala House Courts, New Delhi.

2. The brief facts, which emerge from the material on record, are that the respondent-Company (complainant before the Trial Court) is engaged in the business of advancing loans under various schemes for residential accommodation to individuals and groups/societies after entering into a written agreement/contract with the borrower. The petitioner herein, is a borrower who entered into a loan agreement with the respondent-Company.

3. The respondent-Company had disbursed two loans of Rs.3,13,66,000/- and Rs.86,34,000/- vide Loan Account Nos. 607962423 and 6075207703 respectively to the petitioner vide a written agreement dated 01.03.2013.

4. The petitioner had agreed to repay the said loan amount advanced by the respondent-Company with interest in Equated Monthly Installments (EMI). The petitioner for the part payment of the outstanding dues in respect of the two loans had issued four cheques in total, i.e. three cheques Nos.327979, 327980 and 327981 dated 31.01.2016 and another cheque No.683005 dated 31.03.2016 for an amount of Rs.11,84,385/-, Rs.7,89,590/-, 2,02,000/- and Rs.6,00,000/- respectively, from the account of M/s Gold Field Shiksha Sanstha. On presentation of the said cheques, the same were dishonoured and returned to the respondent-Company with the endorsement "Refer to Drawer" on 04.04.2016.

5. Thereafter, the respondent-Company issued legal notices dated 28.04.2016 to the petitioner and the same were received by the petitioner on 03.05.2016. Despite receiving the said notices, the petitioner did not make the requisite payment within the stipulated period of 15 days.

Hence, the respondent-Company filed the complaints under Section 138 of the NI Act.

6. Learned counsel for the petitioner submitted that the petitioner has already paid the entire amount which fact has not been disclosed by the respondent. It is further submitted by the learned counsel that even otherwise, the respondent has not filed the relevant documents which convinced the Trial Court to pass the summoning order, and the respondent could have initiated proceedings under Section 138 of the NI Act only in case the respondent was not able to recover the loan amount from auctioning of the property under security.

7. Learned counsel for the petitioner, on a query put by the Court, submitted that he has not challenged any specific order of the Trial Court but has sought quashing of the criminal proceedings against the petitioner arising out of Criminal Case Nos.59787/2016 and 59793/2016 on the grounds mentioned in the petitions.

8. The list of dates and synopsis placed on record demonstrate that the notice under Section 251 of Cr.PC. has been framed against the petitioner and she pleaded not guilty and claimed trial and also moved an application under Section 145 (2) of the NI Act which was allowed by the Trial Court. Thereafter, the Authorized Representative of the complainant-Company (respondent herein) was cross-examined by the learned counsel for the petitioner and was discharged.

9. 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 NI Act & 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. In this case, notice under Section 251 Cr.PC. has already been framed against the petitioner and she has pleaded not guilty and claimed trial. An application under Section 145(2) of the NI Act filed by the petitioner was allowed. The Authorized Representative of the complainant has already been cross-examined by the counsel for the petitioner and was discharged.

15. 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.

16. 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, inasmuch 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.”

17. 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.

18. 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.

19. 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."

20. 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 raised by the petitioner in the petitions requires oral as well as documentary evidence, which cannot be appreciated, evaluated or adjudged in the proceedings under Section 482 of Cr.PC.

21. The bare assertions of the learned counsel for the petitioner that the petitioner has already paid the amount or the respondent has already received or realized the cheque amount or the cheques are without consideration as well as the other contentions raised in the petitions, are only bald submissions at this stage which are required to be proved by way of oral and documentary evidence on record, by the petitioner. This

Court, at this stage, neither can interfere nor can intervene nor can quash the proceedings pending before the Trial Court.

22. 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.

The prayers are untenable in law. Hence, this Court does not deem it appropriate to issue notice to the respondent. Accordingly, the petitions are dismissed with cost of Rs.5,000/- in each case, to be deposited by the petitioner in the Prime Minister's National Relief Fund, within two weeks from today.

CHANDER SHEKHAR, J

FEBRUARY 08, 2019/rk/tp

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