

HIGH COURT OF CHHATTISGARH, BILASPURCriminal Misc. Petition No.775 of 2020

1. M/s Vicon Developers Pvt. Ltd. Through its Director Varun Jain, S/o Shri Vimal Jain, aged about 37 years, R/o Chobey Colony, Raipur (C.G.)
2. Varun Jain, S/o Shri Vimal Jain, aged about 37 years, R/o Chobey Colony, Raipur (C.G.)

(Respondents)
---- Petitioners

Versus

1. Khandwa Oils Private Limited, Through Director Sanjay Shri Shrimal, S/o Late Shantilal Shri Shrimal, aged about 50 years, R/o Shri Shrimal House, Civil Lines, Raipur (C.G.)
2. Sanjay Shri Shrimal, S/o Late Shantilal Shri Shrimal, aged about 50 years, R/o Shri Shrimal House, Civil Lines, Raipur (C.G.)

(Applicants)
---- Respondents

For Petitioners: Mr. Mayank Kumar, Advocate.
For Respondents: Not noticed.
For State: Mr. Ravi Kumar Bhagat, Deputy Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

11/06/2020

1. Proceedings of this matter have been conducted through video conferencing from the High Court premises at Bodri, Bilaspur.
2. The respondents / complainants filed a complaint against the petitioners for offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the NI Act') supported by affidavit stating inter alia that the petitioners issued a cheque amounting to ₹ 1,07,99,719/- to the respondents / complainants towards their outstanding liability which the respondents / complainants have received from the petitioners for

providing Taj Villa at Labhandi, Raipur. When the cheque was presented, it has become dishonoured and thereafter the complainants sent legal notice demanding payment of money which was not responded leading to filing of complaint in which the learned Judicial Magistrate took cognizance of the offence under Section 138 of the NI Act on 8-1-2015 and summons were issued to the petitioners/accused.

3. The petitioners after appearance filed an application under Section 203 of the Code of Criminal Procedure, 1973 (for short, 'the Code') stating that the complaint as framed and filed is not maintainable and therefore the complaint be dismissed. The petitioners further filed an objection based on Section 118(a) of the NI Act read with Section 165 of the Evidence Act stating inter alia that the complainants have not disclosed their complete identity with regard to the name of the Director etc., and therefore the complainants be directed to produce documents regarding Khandwa Oils and other details with regard to the accounts. The offence has been registered on 8-1-2015.
4. The aforesaid applications came up for consideration before the learned Magistrate on 3-10-2019 and both the applications came to be rejected holding that the offence under Section 138 of the NI Act registered against the petitioners is triable as summon trial and in summon trial there is no provision for discharge of accused persons and they are free to setup their defence at appropriate stage. However, the learned Magistrate also rejected the other applications for production of documents on the ground that at present, the complaint is at initial stage and the petitioners are free to lead evidence at defence stage against which the petitioners preferred revisions before the revisional Court and the revisional Court concurred

with the findings of the trial Magistrate and dismissed the revisions against which these petitions under Section 482 of the Code have been filed.

5. Mr. Mayank Kumar, learned counsel for the petitioners, would submit that the learned Magistrate trying the offence under Section 138 of the NI Act has power and jurisdiction to discharge the accused, if no prima facie case is made out against him relying upon the decision of the Supreme Court in the matter of Bhushan Kumar and another v. State (NCT of Delhi) and another¹ followed by the Delhi High Court in the matter of Urrshila Kerkar v. Make My Trip (India) Private Ltd.² and would further submit that in the light of that, the petitions deserve to be allowed and the complaint be dismissed.
6. None present for the respondents (not noticed).
7. Mr. Ravi Kumar Bhagat, learned State counsel assisting the Court, would submit that offence under Section 138 of the NI Act is triable as summon case and in the Code there is no provision for discharge of the accused once the offence under Section 138 of the NI Act is registered and the only option available to the learned Magistrate is either to acquit the accused herein or to convict them at the conclusion of trial, midway no other option is available to the Magistrate in a summon case and offence under Section 138 of the NI Act is admittedly triable as summon case. He would rely upon the decision of the Supreme Court in the matter of Adalat Prasad v. Rooplal Jindal³ to buttress his submission.
8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with

1 (2012) 5 SCC 424

2 2013 SCC OnLine Del 4563

3 (2004) 7 SCC 338

utmost circumspection.

9. Chapter XX of the Code (from Section 251 to 259), which deals with trial of summons-cases, does not contemplate discharge of the accused.
10. From the provisions contained in Sections 251 to 259 of the Code, it is quite clear that in a summons case what the Court does on the appearance of the accused is to state the particulars of the offence, and to ask him whether he pleads guilty or has any defence to make. If the accused does not plead guilty the Court will proceed to record the evidence on the side of the prosecution, hear the accused and take the evidence that the defence may produce. The Court will then either hold the accused not guilty or convict him. Section 255(3) of the Code empowers the Court to convict the accused of any offence which from the facts admitted or proved he appears to have committed, if the Magistrate is satisfied that the accused would not be prejudiced thereby. It is significant to note that Chapter XX of the Code which deals with trial of summons-cases, does not contemplate a discharge of the accused.
11. Their Lordships of the Supreme Court in Adalat Prasad (supra), clearly held that if the Magistrate issues process without any basis, the remedy lies in the petition under Section 482 of the Code, there is no power with the Magistrate to review that order and recall the summons issued to the accused.
12. The aforesaid principle of law in Adalat Prasad (supra) was followed by the Supreme Court in the matter of Subramaniam Sethuraman v. State of Maharashtra and another⁴ where their Lordships pertinently held as under:

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“Discharge, Review, Re-Consideration, Recall of order of issue of process under Section 204 of the Cr.P.C. Is not contemplated under the Cr.P.C. in a summons cases. Once the accused has been summoned, the trial court has to record the plea of the accused (as per Section 251 of the Cr.P.C.) and the matter has to be taken to trial to its logical conclusion and there is no provision which permits a dropping of proceedings, along the way.”

13. Similarly, in the matter of R.K. Aggarwal v. Brig. Mandan Lal Nassa and another⁵, the Delhi High Court has pertinently observed as under: -

“There is no basis in the contention of the petitioners for discharge for the reasons that firstly, there is no stage of discharge in a summons case. Under Chapter XX of Cr.P.C., after filing a private complaint, in a summons case, the accused is either convicted or acquitted. There is no stage of discharge of an accused at any stage under Chapter XX of Cr.P.C.”

14. Similarly and pertinently, the Karnataka High Court in the matter of Zulekha v. Mahadev Bharmaji⁶ specifically held that a prosecution under Section 138 of the NI Act did not entail any discharge.

15. From the aforesaid legal analysis, it is quite vivid that in summons-cases once offence under Section 138 of the NI Act is registered under the provisions of the NI Act it has to be tried as a summon case and in summon case, there is no provision for recall or revocation of summons already issued to the accused. The accused has to face the trial and he has to be either acquitted or convicted by the said Court and remedy of the accused, if any, to question the order issuing summons to him, is to file a petition under Section 482 of the Code. As such, the order passed by the learned trial Court duly affirmed by the revisional Court holding that in summon-trial of offence under Section 138 of the NI Act the accused cannot be discharged, is an order which does not need interdiction by this

5 2016 SCC OnLine Del 3720

6 Cri. Petition No.11193/2012, decided on 26-9-2012

Court in exercise of its inherent jurisdiction. Accordingly, both the Courts below are absolutely justified in rejecting the applications filed by the petitioners claiming discharge.

16. The petitioners' another application claiming production of documents relating to Company – Khandwa Oils has rightly been rejected by the trial Court as at the stage of evidence, the petitioners are not entitled for seeking production of documents in view of the decision of the Supreme Court in the matter of State of Orissa v. Debendra Nath Padhi⁷.

17. At this stage, it would be appropriate to take note of the provisions contained in Section 91 of the Code which provides as under: -

“91. Summons to produce document or other thing.—(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed—

(a) to affect, sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891) or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.”

18. A careful perusal of the aforesaid provision would show that the power to issue a summons for the production of a document or a thing is to be exercised whenever the Court considers that its production is necessary or desirable for the purposes of investigation, inquiry, trial or other proceeding. In other words, the power is available to the Court at every stage of proceedings contemplated under the Code. It has to be noticed that this power is available not only to the Court but also to any officer-in-charge of a police station and the only condition for the exercise of the power is that the production of the document or the thing should be necessary or desirable for purposes of the proceedings and the only restriction is that contained under sub-section (3) which provides that the provisions of the Section shall not affect Sections 123 and 124 of the Evidence Act or apply to articles in the custody of the Postal or Telegraph authorities.

19. The Supreme Court has an occasion to consider the scope and ambit of Section 91 of the Code in a three-Bench judgment in Debendra Nath Padhi's case (supra) in which Their Lordships of the Supreme Court have held that Section 91 of the Code does not confer right on the accused to seek production of document to prove his defence at the initial stage of framing the charge and observed as under: -

“25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is “necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code”. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage

of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227 what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by Court and under a written order an officer in charge of a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof.”

20. Their Lordships further considered the matter with reference to its earlier decision in the matter of Om Parkash Sharma v. CBI⁸ and held as under: -

“28. We are of the view that jurisdiction under Section 91 of the Code when invoked by accused, the necessity and desirability would have to be seen by the court in the context of the purpose — investigation, inquiry, trial or other proceedings under the Code. It would also have to be borne in mind that law does not permit a roving or fishing inquiry.”

21. The principle of law laid down in Debendra Nath Padhi's case (supra) was followed with approval by their Lordships in the matter of V.L.S. Finance Limited v. S.P. Gupta and another⁹. Their Lordships agreed with the proposition of law laid down in Debendra Nath Padhi's case (supra). (See paragraph 49 of that report.)

⁸ (2000) 5 SCC 679

⁹ (2016) 3 SCC 736

22. Very recently, in the matter of Nitya Dharmananda alias K. Lenin and another v. Gopal Sheelum Reddy also known as Nithya Bhaktananda and another¹⁰, Their Lordships followed the principle of law laid down in Debendra Nath Padhi's case (supra) and held that defence has no right to invoke Section 91 of the CrPC de hors the satisfaction of the Court, at the stage of charge and observed as under: -

“8. Thus, it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge-sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/ prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge-sheet. It does not mean that the defence has a right to invoke Section 91 CrPC de hors the satisfaction of the court, at the stage of charge.”

23. In view of the above, both the Courts below are absolutely justified in rejecting the application for production of documents at the initial stage.

24. As a fallout and consequence of the aforesaid discussion, I do not find any merit in this batch of petitions under Section 482 of the Code. Accordingly, the petitions deserve to be and are hereby dismissed *in limine*. However, this will not bar the petitioners to invoke the remedy (if any) available under the law.

Sd/-
(Sanjay K. Agrawal)
Judge

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