

HIGH COURT OF CHHATTISGARH AT BILASPUR**Cr.M.P. No. 1730 of 2019**

Tularam Patel, Aged about 70 years, S/o Late
Jageshwar Patel, R/o Village Bhauradadar, Post
Lambar, Tahsil Basna, Distt. Mahasamund,
Chhattisgarh.

--Petitioner**Versus**

Sunil Shukla, Aged about 52 years, S/o R.K. Shukla,
R/o A-38, Chugani Pride, Changorabhata, Raipur,
Tahsil and Distt. Raipur, Chhattisgarh.

--Respondent

For Petitioner :- Mr. Ankur Agrawal, Advocate
For Respondent :- Mr. Mateen Siddiqui, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal
Order on Board

18/02/2020

1. Petitioner herein is facing trial for offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'NI Act') wherein he took an express objection based on Section 142(2)(a) of the NI Act stating *inter alia* that Ms. Neha Usendi, J.M.F.C. Raipur had no jurisdiction to take cognizance of offence against the petitioner as she was conferred with the jurisdiction to try the cases relating to NI Act arising from Khamtarai, Abhanpur, D.D. Nagar and Aamanaka

Police Stations and the cognizance of the alleged offence ought to have been taken by Ms. Namrata Norge, J.M.F.C. Raipur who has the jurisdiction to try the cases relating to NI Act arising from Pandri, Rakhi, Azad Chowk and Saraswati Nagar Police Stations. Since, the alleged offence has arisen from Police Station Pandri, therefore, Ms. Neha Usendi, J.M.F.C. Raipur could not have taken cognizance of aforesaid offence against the petitioner. The said objection was rejected by learned trial Magistrate vide order dated 14/03/2019 in view of Section 460(e) of the Cr.P.C. and further holding that since the trial is a summon trial, therefore, the petitioner/accused cannot be discharged, against which the present petitioner preferred a revision, but learned revisional Court agreed with the reasoning recorded by the trial Magistrate and dismissed the revision vide impugned order dated 03/05/2019 which is under challenge in the present petition under Section 482 of the Cr.P.C.

2.Mr. Ankur Agrawal, learned counsel for the petitioner would submit that both the Courts below are absolutely unjustified in rejecting the objection raised by the petitioner as

Ms. Neha Usendi, J.M.F.C. Raipur had no jurisdiction to take cognizance of offence under Section 138 of the NI Act against the petitioner in view of the provision contained under Section 142(1)(a) of the NI Act and it is a matter which is not covered by Section 460(e) of the Cr.P.C. He further submits that cognizance of offence taken against the petitioner is also hit by virtue of Section 202(1) of the Cr.P.C., as such, the impugned order deserves to be set aside.

3.Mr. Mateen Siddiqui, learned counsel for the respondent would support the impugned order and submit that it is only irregularity which is covered within the meaning of Section 460(e) of the Cr.P.C. which has rightly been held by the trial Court as affirmed by the revisional Court, as such, no interference is warranted in jurisdiction under Section 482 of the Cr.P.C.

4.I have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.

5.Both the Courts below have partly agreed with the petitioner/accused that cognizance of offence under Section 138 of NI Act could not have been taken by Ms. Neha Usendi, J.M.F.C. Raipur as she

was conferred with the jurisdiction to try the cases based on NI Act arising from Khamtarai, Abhanpur, D.D. Nagar and Aamanaka Police Stations and the cognizance of offence ought to have been taken by Ms. Namrata Norge, J.M.F.C. Raipur as the offence under Section 138 of the NI Act alleged to have been committed by the petitioner/accused has arisen from Police Station Pandri and it lies within her jurisdiction, but both the Courts below have categorically held that taking cognizance of offence against the petitioner under Section 190(1)(a) of the Cr.P.C. by Ms. Neha Usendi, J.M.F.C. Raipur is only an irregularity which would not vitiate the proceedings in view of provision contained under Section 460(e) of the Cr.P.C.

6. At this stage, it would be appropriate to notice Section 460(e) of the Cr.P.C. which states as under :-

"460. Irregularities which do not vitiate proceedings. - If any Magistrate not empowered by law to do any of the following things, namely :-

- | | | | |
|-----|-----|-----|-----|
| (a) | XXX | XXX | XXX |
| (b) | XXX | XXX | XXX |
| (c) | XXX | XXX | XXX |
| (d) | XXX | XXX | XXX |

(e) to take cognizance of an offence under clause (a) or clause (b) of sub-section (1) of section 190;

(f) XXX XXX XXX

(g) XXX XXX XXX

(h) XXX XXX XXX

(i) XXX XXX XXX

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered."

7. The provision contained in Section 460(e) of the Cr.P.C. saves proceedings before a Magistrate taken on complaint or on police report of which cognizance is taken erroneously and in good faith but without the Magistrate having the requisite power to take cognizance on such material and irregularities set out in Section 460 do not vitiate proceedings.

8. In the matter of Purshottam Jethanand v. The State of Kutch¹, their Lordships of the Supreme Court have held, where a Magistrate has taken cognizance of offence under Section 190(1)(a)(b) of the Cr.P.C., though not empowered to do so, defect is cured by Section 529 of the Cr.P.C.,

¹ AIR 1954 SC 700

1868 (Section 460 of Cr.P.C.,1973). It was held as under :-

"Where a Magistrate of the First Class, though not empowered to do so, takes in good faith cognizance of offence under S. 190(1) (a) and (b), the defect in the absence of any prejudice to the accused is cured by S. 529. And further the defect will be held as cured by a bona fide decision given by the Magistrate as to the existence of the power when objection thereto is taken, even assuming without deciding that the "taking of cognizance" was then continuing."

9. Similarly, in the matter of Willie (William) Slaney v. The State of Madhya Pradesh², their Lordships of the Supreme Court (Constitution Bench) have clearly held in cases covered by Section 529 of the Cr.P.C.,1898 (now, Section 460 of Cr.P.C.,1973) the question of prejudice is irrelevant and held as under :-

"18. We now proceed to examine the relevant sections of the Code. Chapter XLV deals generally with irregular proceedings. There are certain irregularities which do not vitiate the proceedings. They are set out in section 529. No question of prejudice arises in this class of case because the section states categorically that they shall not vitiate the proceedings.

Certain other irregularities are treated as vital and there the proceedings are void irrespective of prejudice. These are set out in section 530. A third class is dealt with in sections 531, 532, 533, 536(2) and 537. There, broadly speaking, the question is whether the error has caused prejudice to the accused or, as some of the sections put it, has occasioned a failure of justice. The example we have given are illustrative and not exhaustive.

What we are seeking to demonstrate is that the Code has carefully classified certain kinds of error and expressly indicates how they are to be dealt with. In every such case the Court is bound to give effect to the express commands of the legislature: there is no scope for further speculation. The only class of case in which the Courts are free to reach a decision is that for which no express provision is made."

10. Reverting back to the facts of the present case in light of the aforesaid provision and in view of principles of law laid down by the Supreme Court in the matter of Purshottam Jethanand (supra) and Willie (William) Slaney (supra), it is quite vivid that in the instant case, admittedly, Ms. Neha Usendi, J.M.F.C. Raipur has taken cognizance of offence under Section 138 of the NI Act against the petitioner

under Section 190(1)(a) of the Cr.P.C. though she was not empowered to do so in light of provision contained under Section 142(2)(a) of the NI Act read with the work division memo dated 02/08/2018 issued by the Chief Judicial Magistrate. It is not alleged by the petitioner that jurisdiction of taking cognizance under Section 190(1)(a) of the Cr.P.C. was exercised by Ms. Neha Usendi, J.M.F.C. Raipur in bad faith, though it has been argued that matter is not covered by Section 460(e) of the Cr.P.C., but in my considered opinion, cognizance of offence against the petitioner under Section 138 of the NI Act was taken by Ms. Neha Usendi, J.M.F.C. Raipur under Section 190(1)(a) of the Cr.P.C. in good faith and that too, erroneously therefore, it is squarely covered by Section 460(e) of the Cr.P.C. and thereby, proceeding would not vitiate, as such, the proceeding is not liable to be set aside and the same has rightly been held by the trial Magistrate which has rightly been affirmed by the revisional Court and it is hereby reaffirmed.

11. The next contention of learned counsel for the petitioner is that cognizance of offence under Section 138 of the NI Act taken against the

petitioner is also hit by virtue of Section 202(1) of the Cr.P.C. as the said provision is mandatory.

12. The Supreme Court in the matter of **K.S. Joseph v. Philips Carbon Black Ltd. and Anr.**³ has held that Section 145 of the NI Act, being non obstante clause overrides the requirement of examination of the complainant and complainant's evidence on affidavit will be sufficient. It has been 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 Cooperative Bank Ltd. v. Nimesh B. Thakore⁴. 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

³ AIR 2016 SC 2149

⁴ (2010) 3 SCC 83

included "to prescribe procedure for dispensing with preliminary evidence of the complainant".

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."

13. In this view of the matter, the aforesaid plea is also *sans merit* and it is rejected accordingly.

14. In view of the above-stated legal analysis, the present petition under Section 482 of the Cr.P.C. deserves to be and is accordingly dismissed. No cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge