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

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Date of Decision: 05.02.2020

+ CRL.M.C. 633/2020

GULAM REZA

..... Petitioner

Through Dr. Syed Ejaz Abbas Naqvi, Adv.

versus

ITPL INFRASTRUCTURE PVT. LTD. & ANR

.... Respondents

Through

CORAM:

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

RAJNISH BHATNAGAR J. (ORAL)

CRL. M.A. 2630/2020

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

CRL.M.C. 633/2020

1. The petitioner has filed the present petition u/s 482 of the Cr.P.C. with the prayer to quash the summon dated 19.08.2019 regarding issuance of the process alongwith the CT Case No. 12356/19 under Section 138 of the NI Act pending in the Court of MM-4, South District, Saket Court.

2. The respondent herein had instituted a complaint under section 138 Negotiable Instruments Act 1881 read with Section 420 IPC against the petitioner herein in respect of non-payment against one dishonoured cheque for the amount of Rs. 65,00,000/- issued by petitioner in favour of the respondent company.
3. The Metropolitan Magistrate issued summons dated 19/08/2019 U/s 138 NI Act requiring the petitioner to attend the Court.
4. The petitioner feeling aggrieved, filed the present petition invoking jurisdiction of this Court U/s 482 Cr.P.C.
5. It has been mainly argued by the Ld. counsel for the petitioner that there are no dues towards anyone as the respondent has received the entire amount. He further argued that criminal colour has been given to civil proceedings.
6. Now coming to the legal position in this case 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.

7. 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

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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."

14. 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 petitioners in the petition requires evidence, which cannot be appreciated, evaluated or adjudged in the proceedings under Section 482 of Cr.PC and the same can only be proved in the Court of law. Reliance can be placed upon "*State of Madhya Pradesh Vs. Yogendra Singh Jadon & Anr*", Criminal Appeal No. 175 of 2020 (Arising out of SLP (Criminal) No. 172 of 2017) decided by the Hon'ble Supreme Court on January 31, 2020 in which it has been held that "the power under Section 482 of the Code of Criminal Procedure, 1973 cannot be exercised where the allegations are required to be proved in Court of law".

15. 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.

16. The prayers are untenable in law. Hence, this Court does not deem it appropriate to issue notice to the respondent. Accordingly, the petition is dismissed.

RAJNISH BHATNAGAR, J.

FEBRUARY 05, 2020

Sumant