# IN THE HIGH COURT AT CALCUTTA

# CRIMINAL REVISIONAL JURISDICTION

# APPELLATE SIDE

**Present:**

**The Hon'ble Justice Ajoy Kumar Mukherjee**

**CRR 4130 of 2011**

Abhijit Kavade
Vs.
The State of West Bengal & Anr.

For the petitioner: Mr. Pratim Priya Dasgupta
Mr. Amit Dey

Heard on: 25.03.2022

Judgment on: 05.04.2022

**Ajoy Kumar Mukherjee, J.**

**1.** None appeared on behalf of the opposite parties inspite of serving notice in compliance with order of this court dated 24.02.2022. Affidavit of service filed by the petitioner today be kept with the record. The matter is taken up for hearing. Heard Mr. P.P. Dasgupta, learned counsel for the petitioner. Pursuing to a petition of complaint filed by the opposite party No. 2, (herein after called as OP-2), the petitioner herein Abhijit Kavade, manager of HDFC Bank along with two other persons have been arrayed in complaint case No.C-16913/2011 before learned Chief Metropolitan Magistrate, Calcutta to answer the allegation revealed under sections 406/409/120B of the Indian Penal Code. The petitioner herein who has been described as accused No. 3, on the basis of summon issued against him, approached this court to quash the proceeding on some grounds.

**2.** The allegations levelled in the said complaint is that complainant/OP-2 placed an order for supply of paper mills equipments for modification of paper machine with accused No. 1 namely R.D. Desai, proprietor of D.S. Engineer on 30th September, 2009 for a sum of Rs. 75,69,380/-. In the said order it was specifically mentioned by the OP-2 that the accused No. 1 shall execute a performance bank guarantee which will be 10% of the purchase price and by virtue of such specific clause, the accused No.1 through his HDFC Bank Ahmadabad branch, where the accused No. 2 Biswanath Lyer and the petitioner herein /accused No. 3 are working as senior manager. Manager accordingly executed a bank guarantee for Rs. 8,30,000/-in favour of OP-2/complainant duly signed by the petitioner herein /accused No. 3. It has been specifically mentioned by the bank authority that they would pay the guarantee amount to OP-2/complainant , if a written demand is made to the bank on or before September, 2011. OP-2/complainant vide letter dated 01.12.2010 demanded the guarantee money from the concerned bank through a demand draft, which issued in favour of OP-2 as the equipment purchased under order dated 30.09.2009 from accused No. 1 was not performing properly pursuant to which , the OP- 2/complainant had to suffer huge loss and damages.

**3.** However though the original bank guarantee was sent to the bank authority through courier service, but the bank mentioned that the original bank guarantee is not with the bank and the same is lying with accused No. 1 and hence the payment/guarantee money was not effected by the bank authority and for which the said complaint was filed.

**4.** Subsequent to filing of the aforesaid complaint, Chief Metropolitan Magistrate, Calcutta vide order dated 29.06.2011 was pleased to transfer the same to the court of the learned Metropolitan Magistrate , 14th Court, Calcutta for disposal. Subsequently the Metropolitan Magistrate 14th Court, Calcutta, vide his impugned order dated 27.07.2011, after taking cognizance, issued summon upon petitioner herein and other two accused persons.

**5.** Learned Counsel appearing on behalf of the petitioner submits that subsequent to receiving the copy of claim letter sent by OP-2 for the said guarantee money the petitioner/bank authority issued a letter dated 01.12.2011, requesting the accused No.1 to make arrangement of fund. He further submits that subsequent to receiving the claim letter and preparing the demand draft in favour for OP-2, the petitioner herein /bank authority on numerous occasions requested the OP-2 herein to send the original bank guarantee which was lying with him, but he did not pay any heed to that request. Finally through an e-mail correspondence, the OP-2 duly admitted that the original bank guarantee has been misplaced at their office and they are unable to find and /or locate the same. Therefore it is evident that there is a clear breach of contract on the part of OP-2 pursuant to which the petitioner herein cannot be held responsible for the alleged offence.

**6.** Mr. Das Gupta, on behalf of the petitioner attacked the impugned order contending that petitioner is completely innocent and in no way involved with the commission of alleged offence. It has been clearly reflected from the impugned order, dated 27.07.2011 passed by the magistrate concerned that there was a total non-application of judicial mind on the part of the magistrate. Moreover, the dispute between the parties is purely civil in nature and the same has been given colour of criminal proceeding by filing the said complaint. In fact the complainant /OP-2 herein has not approached before the court with clean hands and as such the same is liable to be quashed.

**7.** However before going to investigate into the merit of the submissions made on behalf of the petitioner/accused No. 3, I find that there is a basic aspect of the matter which is apparent at the face of the record and without deciding the same, the core aspect of the merit cannot be gone into. It appears that pursuant to the complaint petition filed by OP-2 herein, the Metropolitan Magistrate 14th Court, Calcutta by his order dated 27.07.2011 noted the following order :-

> " *On behalf of the complainant affidavit and some document are filed. Perused the petition of complainant, affidavit and document. Hd. Ld. Advocate for the complainant , considered.*
>
> *A prima facie case u/s-138 of N.I. Act appears to exist. Issue summons to the accused fixing 1.12.11 for S/R & appearance. Complainant is to file requisite.*
>
> *Documents are returned to the complainant after perusal."*

**8**. I am anguished to note that the entire order which forms the very basis of issuing summon upon the accused persons, including the present petitioner, has been acted in a mechanical way on a printed order where the magistrate had put only the next date and put his signature beneath the order. This is a glaring example to show that a responsible officer like judicial magistrate is putting signature on a printed order without even knowing what is written in the order. There is no whisper in the entire complaint put by OP-2 that the complaint relates to any dishonour of cheque to attract section 138 of the Negotiable Instrument Act 1881(N.I. Act). Without going through the contents of the complaint Magistrate found prima facie case under section 138 of N.I. Act. From the sum and substance of the complaint it appears that complainant had tried to make out in his complain No.C-16913/11, a case under section 406/409/120B of the Indian Penal Code and not a single word has been used in the entire complaint in connection with dishonour of any cheque, so that it can attract section 138 of N.I. Act. Curious enough even without understanding the complaint affidavit or document, magistrate had put his signature in the order, which contains that he perused the petition of complaint as well as affidavit and documents and after considering all these he found that a prima facie case under section 138 of N.I. Act appears to exists and accordingly he issued summon to the accused persons including the present petitioner. This is most unfortunate part of the case which destroys the very basis of taking cognizance by the magistrate due to sheer negligence and insensitive and cruel disregard shown by a judicial magistrate.

**9.** It is by now well-settled that although the word “cognizance” has not been described in the Code of Criminal Procedure but under section 190 of the Code of Criminal Procedure, cognizance of offence by magistrate said to have taken when the magistrate takes notice of the acquisition and applies his mind to the allegations made in the complaint and on being satisfied that the allegations, if proved would constitute an offence, only then he decides to initiate the judicial proceeding against the offender by issuing summon. "Taking cognizance of an offence" is not a mere formality. Before taking cognizance magistrate is to apply his judicial mind to see, if on the fact alleged there is prima facie case to issue process. "Taking cognizance" is mental act as well as judicial act. "Taking cognizance" ordinarily means that the magistrate has come to the conclusion that there is a case to be enquired into. Here the order itself revealed, while taking cognizance of the complaint magistrate had not even gone through the complaint itself, far from applying his judicial mind to the entire allegation and even without understanding anything about the allegation levelled, had taking cognizance under section 138 of the N.I. Act and had initiated the proceeding against the alleged offenders. "Taking cognizance" though requires great exercise of judicial mind and is not a mechanical process but it appears in the present case that the magistrate concerned has understood the term " taking cognizance" as delivery system in the post office without application of mind. Unfortunately this is never the intention of the legislature, as is evident from the provision of section 190(a) of Code of Criminal Procedure which shows learned magistrate can proceed on curtain direction upon receiving the petition of complaint of facts which constitute such offence. Magistrate never considered whether the allegations levelled in the complaint constitutes offence under section 138 of N.I. Act and whether prima facie case persists which is pre-eminently required and the same cannot be surrogated to a mechanical process.

**10.** In view of above the way the order dated 27.07.2011 was passed is practically no order at all and since the very basis of the proceeding which cognizance is a *sine qua non,* is taken without going through the contents of complaint ,affidavit and document, so such cognizance is non-est in the eye of law . As aforesaid defect goes to the vary root of the matter the issuance of summon by the magistrate concerned in C-16913/2011 cannot be said to be sustainable in the eye of law and same is liable to be quashed.

**11.** Accordingly entire proceeding in C-16913/2011/T.R. 500/11, before Metropolitan Magistrate 14th Court, Calcutta is quashed. The revisional application accordingly allowed. However, it is made clear that this order will not preclude the parties to pursue their case otherwise maintainable any legal remedy, if available and permitted under the law before appropriate forum.

**12.** There will be no order as to costs .

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

Let the copy of the order be send to the Learned Metropolitan Magistrate, 14th Court, Calcutta.

***(AJOY KUMAR MUKHERJEE, J.)***