

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.2542 of 2011

P.Mallikarjun Rao

.... *Petitioner*
Mr. P.K.Khuntia, Advocate

-Versus-

*Managing Director, Orissa State Co-
operative Bank Ltd.*

.... *Opp. Parties*
Mr. M.K.Panda, ASC

CORAM:
JUSTICE R.K.PATTANAİK

ORDER
18.02.2022

Order No.

05.

1. The petitioner invoking the jurisdiction of the Court under Section 482 of Criminal Procedure Code, 1973 (hereinafter referred to as 'the Cr. P.C.') has assailed the impugned order dated 22nd March, 2011 passed in I.C.C. No.250 of 2011 by the learned S.D.J.M, (Sadar), Cuttack for having taken cognizance of the offence punishable under Section 138 of the Negotiable Instrument Act, 1881 (shortly 'N.I. Act') solely on the ground that due process was not followed as required under law and therefore, it is liable to be quashed.

2. Facts leading to the instant case are as follows. The complainant opposite party filed ICC No.250 of 2011 stating therein that the petitioner after enrolling himself as a member of the Bank applied for a loan of Rs.5 lac in the year 2010 which was sanctioned in his favour but after availing the loan, he neglected to pay the regular installments for which the loan account became

overdue and in that connection, towards part payment of outstanding loan amount, the petitioner issued an account payee cheque bearing No.835764 for an amount of Rs.5,04,472/- dated 31.01.2011 drawn on Andhra Bank, Main Branch, Cuttack which when was presented for encashment, bounced back and since the cheque amount was not paid despite notice, the complaint was filed supported by an affidavit, whereupon, the learned court below took cognizance of the offence under Section 138 of the N.I. Act. Against the order of cognizance dated 22.03.2011, the petitioner has approached the Court seeking it to be quashed on the solitary ground that the learned court below did not record the initial statement of the authorized representative of the Bank in terms of Section 200 Cr. P.C. before taking cognizance under Section 138 of the N.I. Act which was based on an affidavit only.

3. Mr. M.K.Panda, learned counsel for the opposite party contends that the learned court below rightly proceeded on receiving the affidavit from the opposite party complainant which is in accordance with Section 145 of the N.I. Act as there is no mandatory requirement to record initial statement under Section 200 Cr.P.C. and inquiry under Section 202 Cr.P.C. as is normally resorted to in general complaints. It is further contended that the law has now been well settled that on the strength of an affidavit, a Magistrate can proceed taking cognizance under Section 138 of the N.I. Act, as he is not mandatorily obliged to call upon the complainant or to examine the complainant or witnesses on oath for taking the decision whether or not to issue process on such complaint. In support of such contention, Mr. P.K. Khuntia relied upon following decisions, such as, *Banamali Behera Vs. Nirupama Pal*: 2017 (I) OLR 178; *A.C. Narayanan Vs. State of Maharashtra*

and another. 2013 (II) OLR (SC) 884; and *K.S. Joseph Vs. Philips Carbon Black Ltd. and others*. AIR 2016 SC 2149 in order to contend that the learned court below was not mandatorily required to examine the complainant through its representative for the purpose of taking cognizance under Section 138 N.I. Act.

4. Mr. P.K.Khuntia, learned counsel for the petitioner, on the other hand, cited a judgment of Rajasthan High Court in *Prakash Chand Vs. State of Rajasthan and another* reported in 2010(1)D.C.R. 172 and submitted that the order of cognizance under Section 138 N.I. Act since not preceded by examination of the complainant under Section 200 Cr.P.C. and thereafter, followed by an inquiry, it is not sustainable and thus, bad in law.

5. In *Banamali Behera* (supra), this Court by referring to the case of *A.C. Narayanan* ibid held that in the light of Section 145 of the N.I. Act, there is no obligation for a Magistrate to record the statement of the complainant under Section 200 Cr.P.C. before passing an order of cognizance. The Supreme Court in *A.C. Narayanan and K.S. Joseph* (supra) stated to have laid the law to the effect that a Magistrate may proceed in taking cognizance without examining the complainant under Section 200 Cr.P.C. on the basis of the contents of the complaint, documents in support thereof and an affidavit submitted by the complainant justifying the complaint. In *K.S. Joseph* case, the Supreme Court held that the non-obstante clause in sub-section 1 of Section 145 is self-explanatory and overrules the requirement of examination of the complainant on solemn affirmation under Section 200 Cr.P.C. It is further held therein that in the case of *Mandavi Co-operative Bank Ltd. Vs. Nimesh B. Thakore* reported in (2010) 3 SCC 83, the

Supreme Court discussed in detail the amendment of 2002 including Section 145 of the N.I. Act and also noted the Statement of Objects and Reasons appended to the Amendment Bill and held that inter alia, the objects included 'to prescribe procedure for dispensing with preliminary evidence of the complainant'. In so far as, the decision of Rajasthan High Court in ***Prakash Chand*** case is concerned, a contrary view was taken by stating that the scheme and provisions of Sections 142 to 146 of the N.I. Act goes to show that there is no indication that recording of the statement of the complainant under Section 200 Cr.P.C. is to be dispensed with. It is held that Section 145 relates to post cognizance stage and furthermore, not mandatory in nature for the reason that the legislature in its wisdom has used the word 'may' therein. Such a conclusion of Rajasthan High Court cannot any more be endorsed in view of the aforesaid decisions of the Supreme Court one of which has been referred to by this Court in ***Banamali Behera*** case.

6. In view of the above discussion, the Court is of the humble opinion that the contention of the petitioner that the order of cognizance dated 22nd March, 2011 to be untenable in law on the ground so raised must have to be rejected. As a necessary corollary, the learned court below cannot be said to have committed any error or illegality in taking cognizance under Section 138 of the N.I. Act on receiving a complaint accompanied with an affidavit which is in accordance with law and therefore, does not require any interference.

7. Accordingly, it is ordered.

8. In the result, the petition filed under Section 482 Cr.P.C. at the best of the petitioner stands dismissed. Consequently, the order of stay dated 2nd January, 2012 stands vacated.

9. A copy of the above order be sent to the learned court below forthwith in order to facilitate early disposal of I.C.C. Case No.250 of 2011.

(R.K. Pattanaik)
Judge

TUDU

