

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.635 OF 2021

Inayat Ali Hashmat Ali Sayyad,
Age-34 years Occu:Service (Relation Manager),
HDFC Bank, Hingoli Branch,
R/o-Azam Colony Near Indian Bakery,
Hingoli, Tq. & Dist-Hingoli.

...PETITIONER

VERSUS

Krishna S/o Ganesh Marke,
Age-Major, Occu:Business,
R/o-Haran Chowk, Hingoli,
Tq. & Dist-Hingoli.

...RESPONDENT

...
Mrs.Pratibha J. Bharad Advocate for Petitioner.
Mr.S.S. Gangakhedkar Advocate for Respondent.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 13th JUNE, 2022

ORDER :

1. Present Writ Petition has been filed invoking the constitutional powers of this Court under Article 227 of the Constitution of India and inherent powers under Section 482 of the Code of Criminal Procedure for quashing the complaint i.e. S.C.C. No.998 of 2019 filed against the petitioner by the

respondent for the offence punishable under Section 138 of the Negotiable Instruments Act before the learned Judicial Magistrate First Class, Hingoli and to get order below Exhibit-17 dated 29th April 2021 passed by the learned Judicial Magistrate First Class, Hingoli, set aside.

2. Heard learned Advocate Mrs. Bharad appearing for the petitioner and learned Advocate Mr. Gangakhedkar appearing for the respondent.

3. It has been vehemently submitted on behalf of the petitioner – original accused that the learned Judicial Magistrate First Class has committed an error when he has not recorded the evidence before issuing process. Relying upon the decision in ***Maharaja Developers and another vs. Udaysing S/o Pratapsinghrao Bhonsle and another, 2007 ALL MR (Cri) 1339***, it was submitted that the non-obstante clause in Section 142 or 145 of the Negotiable Instruments Act does not override the provisions of Section 200 of the Code of Criminal Procedure and it is mandatory for the Magistrate to examine the complainant who has filed the same under Section 138 of the Negotiable Instruments Act though with an affirmation as regards truthfulness of the contents of the complaint. It, therefore,

follows that the Magistrate is obliged and duty bound to examine upon oath the complainant and his witnesses before issuance of process under Section 204 of the Code of Criminal Procedure though there is a solemn affirmation at the foot of the complaint by the complainant. It was further submitted that application Exhibit-17 was filed by the present petitioner for discharging him. In fact the petitioner – original accused was serving as relation manager with HDFC Bank, Hingoli branch. Petitioner is not running any cloth business for which it is alleged that he had taken hand-loan of Rs.4,90,000/-. There was absolutely no legal enforceable debt or liability for the petitioner – accused so that he could issue any cheque. The real story behind the said cheque is different and the entire story was narrated by the petitioner – accused in Para No.6 of his application Exhibit-17. In the notice reply, the petitioner – accused has given entire story, yet the complaint came to be filed. The petitioner ought not to have been asked to face the trial when there was no legally enforceable debt or liability and therefore, the order passed below Exhibit-17 by the learned Magistrate is illegal. The entire proceeding itself deserves to be quashed and set aside.

4. The learned Advocate appearing for the respondent strongly opposed the Petition and supported the reasons given in

the order passed by the learned Magistrate below Exhibit-17 in the said criminal case. It was further stated that it was the summary criminal case and there is no provision of discharge as such. The learned Judicial Magistrate First Class has rightly observed that he has no powers to review his own order of issuing process in view of the decision in ***Adalat Prasad vs. Rooplal Jindal and others, 2004(7) SCC 338***. The learned Magistrate has not committed any procedural irregularity or illegality and therefore, this cannot be the fit case where the inherent powers of this Court or the constitutional powers of this Court are required to be used.

5. At the outset it is to be noted that in this Writ Petition two points are raised, first is about rejection of application Exhibit-17 on the ground that the learned Magistrate had no power of review and he has wrongly held that the fact in issue is issuance of cheque for legally enforceable debt and if the accused wants to rebut the presumption, he is required to prove the same at the appropriate stage. The second ground for challenge is alleged procedural irregularity that the complainant and his witnesses have not been examined in view of ***Maharaja Developers and another (supra)***. To begin with, the learned Magistrate was very much right in saying that he has no powers to

review or recall his own order in view of the position of law crystallized in ***Adalat Prasad*** (supra). Secondly, the nature of proceedings under Section 138 of the Negotiable Instruments Act is summary in nature in view of Section 143 of the Negotiable Instruments Act. Section 143(1) of the Negotiable Instruments Act prescribes that, notwithstanding anything contained in the Code of Criminal Procedure, all offences under this Chapter shall be tried by a Judicial Magistrate of the First Class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials.

6. It will not be out of place to mention here that the present petitioner appears to have not challenged the order of issuing process against him by the learned Magistrate that was passed on 4th November 2019, by way of revision under Section 397 of the Code of Criminal Procedure or before any other Court including this Court. The petitioner has rather approached the same Court by filing application at Exhibit-17 and the said application does not give nomenclature as to under which provisions of law said application has been filed. No doubt, it is not required to be stated under which provisions of law the said application is filed and that can be so inferred. But, if there is no provision at all which has been prescribed for conduct of summary trial or summons trial under which we can say that the said application Exhibit-17 was filed, then it ought to have been clarified by the petitioner – accused as to under which provisions of law he has filed

the said application. If we consider the prayer clause to Exhibit-17, it can be seen that the petitioner intended to say that since there was no legally enforceable debt or liability, the order of issuing process has been obtained by the complainant illegally and therefore, that order of issuing process deserves to be set aside. The inference of this prayer can only be that the petitioner wanted the learned Magistrate to review his own order or recall his own order, which could not have been made in view of **Adalat Prasad** (supra). Therefore, no fault can be found in the rejection of application Exhibit-17.

7. The ratio laid down in **Maharaja Developers and another** (supra) cannot be denied. However, it can be seen from the Record and Proceedings which was called from the lower Court, that an affidavit of the informant has been produced at Exhibit-2. It was read and recorded by the learned Magistrate on the same day i.e. 27th September 2019. The Hon'ble Supreme Court in **Re: Expeditious Trial of Cases Under Section 138 N.I. Act 1881** reported in [**AIR 2021 Supreme Court 1957**], in paragraph-12 observed as under:-

"12. Another point that has been brought to our notice relates to the interpretation of Section 202(2) which stipulates that the Magistrate shall take evidence of the witness on oath in an inquiry conducted under Section 202(1) for the purpose of issuance of process. Section 145 of the Act provides that the evidence of the complainant may be given by him on affidavit, which shall be read in evidence in any inquiry, trial or other proceeding, notwithstanding anything contained in

the Code. Section 145(2) of the Act enables the court to summon and examine any person giving evidence on affidavit as to the facts contained therein, on an application of the prosecution or the accused. It is contended by the learned Amici Curiae that though there is no specific provision permitting the examination of witnesses on affidavit, Section 145 permits the complainant to be examined by way of an affidavit for the purpose of inquiry under Section 202. He suggested that Section 202 (2) should be read along with Section 145 and in respect of complaints under Section 138, the examination of witnesses also should be permitted on affidavit. Only in exceptional cases, the Magistrate may examine the witnesses personally. Section 145 of the Act is an exception to Section 202 in respect of examination of the complainant by way of an affidavit. There is no specific provision in relation to examination of the witnesses also on affidavit in Section 145. It becomes clear that Section 145 had been inserted in the Act with effect from the year 2003, with the laudable object of speeding up trials in complaints filed under Section 138. If the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. On a holistic reading of Section 145 along with Section 202, we hold that Section 202 (2) of the Code is inapplicable to complaints under Section 138 in respect of examination of witnesses on oath. The evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses. In suitable cases, the Magistrate can examine documents for satisfaction as to the sufficiency of grounds for proceeding under Section 202."

8. Thus, it is clear from the above judgment of Hon'ble Supreme Court that even on the basis of affidavit filed on behalf of the complainant, an accused can be summoned under Section 138 Negotiable Instruments Act and there is no need to record statements under Sections 200 and 202 of the Code of Criminal Procedure. Therefore, there is sufficient compliance in view of the said affidavit that has been produced by the complainant, of the provision under Section 145 of the Negotiable Instruments Act. The affidavit can be taken as the evidence in inquiry which has been covered under Section 145 of the Negotiable Instruments Act. Therefore, since there is no procedural irregularity or illegality, there is no question of interference under either inherent jurisdiction or constitutional powers of this Court and the Writ Petition deserves to be dismissed.

9. The Writ Petition stands dismissed.

[SMT. VIBHA KANKANWADI , J.]