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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Judgment Delivered On: 20.04.2022*

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CRL.REF. 4/2019**COURT ON ITS OWN MOTION**

..... Petitioner

versus

STATE

..... Respondent

Advocates who appeared in this case:

For the petitioner : Mr. N. Hariharan, Amicus Curiae, Sr. Advocate with Mr. Mr. Vaibhav Sharma. Mr. Siddharth S. Yadav, Ms. Punya Rekha Angara, Mr. Yugansh Mittal and Mr. Prateek Bhalla, Advocates.

For the respondent/State : Ms. Nandita Rao, ASC (Criminal) for GNCTD.

CORAM:**HON'BLE MR. JUSTICE SIDDHARTH MRIDUL****HON'BLE MR. JUSTICE RAJNISH BHATNAGAR****J U D G M E N T****SIDDHARTH MRIDUL, J. (OPEN COURT)**

The present criminal reference petition, instituted under Section 395(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') has been referred by the Mr. Gaurav Sharma, learned Metropolitan Magistrate, Negotiable Instruments Act-03, Central District, Tis Hazari Courts, Delhi.

Shorn of all unnecessary details, the present reference raises the following questions for consideration by this Court:-



“1. “To be or not to Be”

The proverbial Hamletian delimma, if were to be defined in terminology with respect to Section 138 of the Negotiable Instruments Act cases, if would read as thus:

“To discharge an accused or not to discharge an Accused”.

2. *The court of the referring Magistrate was seized of the complaint CC No. 519899/16 u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the ‘NI Act’) wherein which process was issued against the accused persons u/s 204 CrPC vide summoning order dated 12.01.2016. The accused persons entered an appearance and subsequently, prior to any notice of accusation u/s 251 CrPC being framed against them, an application for discharge was moved on their behalf on 22.08.2017. Disposal of the same involves a question of law, requiring deeper consideration.*

3. *Appropriately therefore, a Reference is sought to be made under sub section (2) of Section 395 Cr.P.C. by way of which a magistrate may refer for the decision to the Hon’ble High Court any question of law arising in the hearing of a case.*

4. *It is apposite to note that applications of a like nature flood all the designated NI Courts and hence, it is all the more urgent for clarifying the correct position of law in this regard.*

5. *As per Section 143 (1) of the NI Act, a complaint u/s 138 NI Act is treated as a summary triable case ordinarily. However, as per second proviso thereto, it may be treated as a summons triable case also. The section provides as hereunder.”*

A bare perusal of the questions referred to this Court reflects that the issues of determining Question No. 2 to Question No. 5 are dependent upon the answer to Question No. 1.

Mr. N. Hariharan, learned senior counsel, has ably assisted this Court as an *Amicus Curiae* by inviting our attention to the decision of the Constitution Bench In ***Re: Expeditious Trial of Cases Under Section***



138 of N.I. Act, 1881, reported as 2021 SCC Online SC 325, and in particular paragraphs 18-24, which enunciates as follows:-

*“18. It was contended by learned Amici Curiae that a holistic reading of Sections 251 and 258 of the Code, along with Section 143 of the Act, should be considered to confer a power of review or recall of the issuance of process by the Trial Court in relation to complaints filed under Section 138 of the Act. He referred to a judgment of this Court in **Meters and Instruments Private Limited and Another v. Kanchan Mehta** which reads as follows:*

*“While it is true that in **Subramaniam Sethuraman v. State of Maharashtra** this Court observed that once the plea of the accused is recorded under Section 252 CrPC, the procedure contemplated under Chapter XX CrPC has to be followed to take the trial to its logical conclusion, the said judgment was rendered as per statutory provisions prior to the 2002 Amendment. The statutory scheme post-2002 Amendment as considered in **Mandvi Coop. Bank and J.V. Baharuni** has brought about a change in law and it needs to be recognised. After the 2002 Amendment, Section 143 of the Act confers implied power on the Magistrate to discharge the accused if the complainant is compensated to the satisfaction of the court, where the accused tenders the cheque amount with interest and reasonable cost of litigation as assessed by the court. Such an interpretation was consistent with the intention of legislature. The court has to balance the rights of the complainant and the accused and also to enhance access to justice. Basic object of the law is to enhance credibility of the cheque transactions by providing speedy remedy to the complainant without intending to punish the drawer of the cheque whose conduct is reasonable or where compensation to the complainant meets the ends of justice. Appropriate order can be passed by the court in exercise of its inherent power under Section 143 of the Act which is different from compounding by consent of parties. Thus, Section 258 CrPC which enables proceedings to be stopped in a summons case, even though strictly speaking is not applicable to complaint cases, since the provisions of CrPC are applicable “so far as may be”, the principle of the said provision is applicable to a complaint case covered by Section 143 of the Act which contemplates applicability of summary trial provisions, as*



far as possible i.e. with such deviation as may be necessary for speedy trial in the context.”

19. In **Meters and Instruments** (*supra*), this Court was of the opinion that Section 143 of the Act confers implied power on the Magistrate to discharge the accused, if the complainant is compensated to the satisfaction of the court. On that analogy, it was held that apart from compounding by the consent of the parties, the Trial Court has the jurisdiction to pass appropriate orders under Section 143 in exercise of its inherent power. Reliance was placed by this Court on Section 258 of the Code to empower the Trial Courts to pass suitable orders.

20. Section 143 of the Act mandates that the provisions of summary trial of the Code shall apply “as far as may be” to trials of complaints under Section 138. Section 258 of the Code empowers the Magistrate to stop the proceedings at any stage for reasons to be recorded in writing and pronounce a judgment of acquittal in any summons case instituted otherwise than upon complaint. Section 258 of the Code is not applicable to a summons case instituted on a complaint. Therefore, Section 258 cannot come into play in respect of the complaints filed under Section 138 of the Act. The judgment of this Court in **Meters and Instruments** (*supra*) in so far as it conferred power on the Trial Court to discharge an accused is not good law. Support taken from the words “as far as may be” in Section 143 of the Act is inappropriate. The words “as far as may be” in Section 143 are used only in respect of applicability of Sections 262 to 265 of the Code and the summary procedure to be followed for trials under Chapter XVII. Conferring power on the court by reading certain words into provisions is impermissible. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. The Judge’s duty is to interpret and apply the law, not to change it to meet the Judge’s idea of what justice requires. The court cannot add words to a statute or read words into it which are not there.

21. A close scrutiny of the judgments of this Court in **Adalat Prasad** (*supra*) and **Subramaniam Sethuraman** (*supra*) would show that they do not warrant any reconsideration. The Trial Court cannot be conferred with inherent power either to review or recall the order of issuance of process. As held above, this Court, in its anxiety to cut down delays in the disposal of complaints under Section 138, has applied Section 258 to hold that the Trial Court has the power to discharge the



accused even for reasons other than payment of compensation. However, amendment to the Act empowering the Trial Court to reconsider/recall summons may be considered on the recommendation of the Committee constituted by this Court which shall look into this aspect as well.

22. *Another submission made by the learned Amici Curiae relates to the power of the Magistrate under Section 322 of the Code, to revisit the order of issue of process if he has no jurisdiction to try the case. We are in agreement with the learned Amici Curiae that in case the Trial Court is informed that it lacks jurisdiction to issue process for complaints under Section 138 of the Act, the proceedings shall be stayed and the case shall be submitted to the Chief Judicial Magistrate or such other Magistrate having jurisdiction.*

23. *Though we have referred all the other issues which are not decided herein to the Committee appointed by this Court on 10.03.2021, it is necessary to deal with the complaints under Section 138 pending in Appellate Courts, High Courts and in this Court. We are informed by the learned Amici Curiae that cases pending at the appellate stage and before the High Courts and this Court can be settled through mediation. We request the High Courts to identify the pending revisions arising out of complaints filed under Section 138 of the Act and refer them to mediation at the earliest. The Courts before which appeals against judgments in complaints under Section 138 of the Act are pending should be directed to make an effort to settle the disputes through mediation.*

24. *The upshot of the above discussion leads us to the following conclusions:*

1) The High Courts are requested to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 of the Act from summary trial to summons trial.

2) Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the court.

3) For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the



Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses.

4) We recommend that suitable amendments be made to the Act for provision of one trial against a person for multiple offences under Section 138 of the Act committed within a period of 12 months, notwithstanding the restriction in Section 219 of the Code.

5) The High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonour of cheques issued as part of the said transaction.

*6) Judgments of this Court in **Adalat Prasad** (supra) and **Subramaniam Sethuraman** (supra) have interpreted the law correctly and we reiterate that there is no inherent power of Trial Courts to review or recall the issue of summons. This does not affect the power of the Trial Court under Section 322 of the Code to revisit the order of issue of process in case it is brought to the court's notice that it lacks jurisdiction to try the complaint.*

*7) Section 258 of the Code is not applicable to complaints under Section 138 of the Act and findings to the contrary in **Meters and Instruments** (supra) do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the Trial Courts to reconsider/recall summons in respect of complaints under Section 138 shall be considered by the Committee constituted by an order of this Court dated 10.03.2021.*

8) All other points, which have been raised by the Amici Curiae in their preliminary report and written submissions and not considered herein, shall be the subject matter of deliberation by the aforementioned Committee. Any other issue relating to expeditious disposal of complaints under Section 138 of the Act shall also be considered by the Committee."

A plain reading of the paragraphs extracted hereinabove leaves no manner of doubt that in terms of the judgment of the Hon'ble Supreme



Court in *Adalat Prasad v. Rooplal Jindal and Others*, (2004) 7 SCC 338 and *Subramaniam Sethuraman v. State of Maharashtra and Another*, (2004) 13 SCC 324, the Trial Court cannot be conferred with inherent powers, either to review or recall the order of issuance of process. As held in *Adalat Prasad (supra)* and *Subramaniam Sethuraman (supra)*, the Magistrate is deluded with the power to revisit the order of issue of process, except to the limited extent that the Court has no jurisdiction to try the case. In other words, the Trial Court has no inherent jurisdiction to revisit the order of issue of process within the meaning of the provisions of Section 258 Cr.P.C.

Further, it has been clearly held that, in any event, the provisions of Section 258 Cr.P.C. are not applicable to complaints under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'N.I. Act').

In view of the foregoing, we are of the considered view that Question No.1 in the present reference is to be answered in the negative. The Court of a Magistrate does not have the power to discharge the accused upon his appearance in Court in a summons trial case based upon a complaint in general, and particularly in a case under Section 138 of the N.I. Act, once cognizance has already been taken and process issued under Section 204 Cr.P.C.

In lieu of our determination qua Question No. 1, Question No. 2 to Question No. 5 do not arise for consideration.

The present criminal reference is answered accordingly.



A digitalized copy of the judgment be supplied to learned senior counsel appearing for the petitioner, learned Additional Public Prosecutor appearing for the State and learned Metropolitan Magistrate.

**SIDDHARTH MRIDUL
(JUDGE)**

**RAJNISH BHATNAGAR
(JUDGE)**

APRIL 20, 2022/AR

[*Click here to check corrigendum, if any*](#)