

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 158 of 2020

Kamal Singha Roy

Vs

Indian Farm Forestry Development Co-operative Limited

For the Petitioner

: Mr. Kaushik Chatterjee,
Mr. Tirthankar Dey.

For the Opposite Party

: Mr. Shyamal Mukhopadhyay,
Mr. Hiranmoy Ghosh,
Mr. Amarnath Ghosh,
Ms. Priyanka Chatterjee.

Heard on

: 17.01.2023

Judgment on

: 09.02.2023

Shampa Dutt (Paul), J.:

The revisional application has been preferred praying for quashing of proceeding in connection with Complaint Case No. CS/13195/2019 pending before the Learned Metropolitan Magistrate, 12th Court, Calcutta under Section 138 of the Negotiable Instruments Act, 1881 (as amended up-to-date) and all orders passed therein including the orders dated 02.03.2019 and 10.07.2019.

The case of the petitioner is that the petitioner is a reputed businessmen being engaged in the business of fertilizers since long and the petitioner has led his life in the most dignified and decent manner till date and the petitioner has always acted and /or conducted himself in accordance with the provisions of law, equity, social norms.

The petitioner had a long standing business relationship with the opposite party being a distributor of fertilizers. At the inception of the transaction between the parties the petitioner had handed over the cheque in question as security and time to time bills were raised by the opposite party and accordingly payments were also made. The goods supplied by the opposite party were often not as per the specification and quality promised and repeated objections were raised. In retaliation the opposite party had presented the said security cheque for encashment and upon the said security cheque being not honoured by

the banker of the petitioner had issued a demand notice dated 22.01.2019.

The petitioner has been arraigned as an accused person in the instant case on the basis of a written complaint filed by the opposite party before the Learned Chief Metropolitan Magistrate, Calcutta against the petitioner alleging commission of offences punishable under Section 138 of the Negotiable Instruments Act, 1881 (as amended up-to-date).

The petitioner is inter alia engaged in the business of fertilizer since 2015 and made substantial payment for the fertilizer supplied by the opposite party and at present a sum of Rs. 62,06,454.62/- remains as outstanding.

That the petitioner in discharge of his existing legal liability or debt issued an account payee cheque in favour of the opposite party. The opposite party as requested by the petitioner presented the said cheque for encashment to the bank of the petitioner that is Union Bank of India, Mohanpur branch through the banker of the opposite party Indian Overseas Bank. But the same was returned by the banker of the petitioner with the remarks "Funds Insufficient".

That the opposite party through his Learned Advocate send a demand notice dated 22nd January 2019, at the address of the petitioner requesting the petitioner to pay a sum of rupees Rs. 62,06,454.62/- within 15 days from the date of receipt of the notice.

The said demand notice was received by the petitioner on 6th February, 2019 and the petitioner through his Learned Advocate replied to the said letter.

The petitioner despite receipt of the notice deliberately failed to make payment of the amount as covered by the said cheque. Thus the petitioner has committed offence under Section 138 of the Negotiable Instruments Act and is liable to be prosecuted in accordance with law.

By the order dated 02.03.2019 the Learned Chief Metropolitan Magistrate, Kolkata was pleased to take cognizance of the offence and the case was transferred to the Court of the Learned Metropolitan Magistrate, 12th Court, Kolkata for judicial enquiry and trial.

By order dated 10.07.2019 the Learned Metropolitan Magistrate, 12th Court, Kolkata was pleased to issue process against the petitioner.

Mr. Kaushik Chatterjee, learned counsel for the petitioner has submitted that the opposite party being a juristic entity has been represented by one Mr. A.K. Nayek who claims to be competent to file the instant complaint on behalf of the opposite party.

It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

A plain reading of the petition of complaint would reveal that such assertion as to the personal knowledge of the Authorized Representative about the instant loan transaction is significantly absent in the petition of complaint and thus the Authorized Representative of the opposite party is not competent to represent the opposite party and on such score the instant petition is liable to quashed/dismissed in limine.

When the power of attorney holder has not witnessed or does not have the requisite personal knowledge about the transaction, then such representative cannot be examined as a witness in the case.

The very institution and continuance of the instant proceeding against the petitioner is an abuse of the process of law and to prevent the same the instant proceeding is liable to be quashed by the Hon'ble Court qua the present petitioner in the interest of justice by invoking inherent power as enshrined by Section 482 of the Criminal Procedure Code.

That such erroneous and malicious prosecution if allowed to continue will amount to an abuse of the process of the Court.

The instant proceedings is otherwise bad in law and is liable to be quashed for the ends of justice.

Mr. Shyamal Mukhopadhyay learned counsel for the opposite party has submitted by filing affidavit in opposition that though the business relationship with the petitioner is long standing,

the petitioner never handed over the cheque in question as security and the same was paid to the opposite party in discharging the financial liability towards the opposite party which was dishonoured and consequently demand notice was served and consequently the complaint case being No. CS/13195/2019 was filed by the opposite party against the petitioner and as such question of counter blast due to objection raised by the petitioner does not arise at all.

The Learned Magistrate being primarily satisfied with the evidence adduced by the opposite party and by applying his judicial mind, summoned the petitioner which can't be treated as abuse of process of law and accordingly, the proceeding of the complaint case being NO. CS/13195/2019 is not at all liable to be quashed. As the cheque in question was dishonoured on presentation for encashment and as the same was issued in discharging the financial liability of the petitioner, the complaint case being No. CS/13195/2019 has been initiated.

The instant proceeding is harassing and is filed with an ulterior motive to drag/prolong the proceeding of the complaint case being No. CS/13195/2019 and as such is liable to be dismissed in limini with exemplary cost in favour of the opposite party. The instant proceeding is to avoid payment of cheque amount.

A supplementary affidavit has been filed on behalf of the petitioner stating there in that Section 202 Cr.P.C. makes it abundantly

clear that it is obligatory on the part of the Learned Magistrate to hold an inquiry under Section 202 of the Code of Criminal Procedure in the event the accused is residing at a place beyond the area in which he exercise his jurisdiction. In the instant case, the petitioner who has been summoned to appear before the Learned Magistrate admittedly resides beyond the area over which the Learned Magistrate exercises jurisdiction inasmuch as the **petitioner reside** at Haringhata, Bamanpara, Post Office – Sri Krishnapur, Police Station-**Haringhata, Nadia** – 743711. It, therefore brings no controversy that it was incumbent upon the Learned Magistrate to hold an inquiry as envisaged under Section 202 of the Code of Criminal Procedure prior to taking recourse to the provisions of section 204 of the Code of Criminal Procedure. In the present case as evident from the order sheet, it is clear that the inquiry under Section 202 of the Code of Criminal Procedure was not conducted by the Learned Magistrate.

The legislative intent must be complied with by Learned Magistrate, failing which the proceeding shall be vitiated by an incurable irregularity as has happened in the instant case. The inquiry under Section 202 of the code of Criminal Procedure is a stricter and more searching inquiry as is required under Section 200 of the Code of Criminal Procedure. Prior to advert to Section 202 of the Code of Criminal Procedure, it is incumbent upon the learned court to postpone the issuance of process upon the accused person and then direct an

investigation under Section 202 of the Code of Criminal Procedure or to conduct an inquiry by the court itself. Such procedure has not been adhered to by the learned court below and thus the order issuing process gets automatically vitiated.

In their **affidavit in opposition** the opposite party has stated the provision of Section 202 of the Code of Criminal Procedure is not applicable in the instant case inasmuch as the instant case arose out of a proceeding under Section 138 of the N.I. Act which is a special statute whereby the Learned Metropolitan Magistrate is empowered under Section 142(2) to entertain a complaint for an offence under Section 138 of the N.I. Act.

The Learned Magistrate duly conducted inquiry into the matter by taking evidence of the complainant on oath by following the provisions as laid down in Section 202 of the Code of Criminal Procedure and as such the Learned Magistrate duly complied with the legislative intention and accordingly the order issuing process was passed as per law.

Heard learned counsel for both the parties, perused the material on record.

Considered.

In support of their contention that the opposite party's authorized representative has knowledge regarding this case and that his representation is in accordance with law the opposite party has

relied upon in A.C. Narayanan vs State of Maharashtra and Another, Criminal Appeal No. 73 of 2007, (2014) 11 SCC 790.

Thus the said representation of the opposite party appears to be in accordance with law and shall be considered by the Learned Magistrate independently at the time of final disposal and not be influenced by the view expressed by this court.

In respect of the compliance of Section 202 of the Cr.P.C. by the Magistrate, the petitioners have relied upon:-

A) The judgment of the Five Judge Bench of the Supreme Court in Re expeditious trial of cases under Section 138 of NI Act, 1881 on 16.04.2021.

***Para 12** “.....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.”*

B) Sunil Todi & Ors. vs. State of Gujarat & Anr., Criminal Appeal No. 1446 of 2021 and with 1447 of 2021, on December 03, 2021.

***“38.** Section 145 of the NI Act provides that evidence of the complainant may be given*

by him on affidavit, which shall be read in evidence in an inquiry, trial or other proceeding notwithstanding anything contained in the CrPC. The Constitution Bench held that Section 145 has been inserted in the Act, with effect from 2003 with the laudable object of speeding up trials in complaints filed under Section 138. Hence, the Court noted that 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. Consequently, it was held that Section 202(2) CrPC is inapplicable to complaints under Section 138 in respect of the examination of witnesses on oath. The Court held that 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 and in suitable cases the Magistrate can examine documents to be satisfied that there are sufficient grounds for proceeding under Section 202.

39. *In the present case, the Magistrate has adverted to:*

- (i) The complaint;*
- (ii) The affidavit filed by the complainant;*
- (iii) The evidence as per evidence list and;*
- and*
- (iv) The submissions of the complainant.”*

The relevant orders of the Magistrate are order dated 02.03.2019 and order dated 10.07.2019.

Order No. 1

Dated : 02.03.2019

Complaint filed along with an affidavit and documents by the complainant seeking prosecution of accused u/s 138/141 of the Negotiable Instrument Act.

Considered.

Cognizance is taken.

Let the record be transferred to the file of Ld. Metropolitan Magistrate, 12th Court, for enquiry and disposal according to law.

Dictated.

**Sd/-
Chief Metropolitan Magistrate,
Calcutta.**

CS/13195/2019

Order dated 10.07.2019

Today is fixed for S.A.

Complainant files hazira along with evidence on affidavit u/s. 145 (1) of N.I.Act.

It appears from the record that Ld. CMM at Calcutta had already been pleased to take cognizance vide order dated 02.03.2019.

Hence, there is no scope of further examination of the complainant u/s. 200 Cr.P.C.

The evidence on affidavit as filed by the complainant be kept with record.

Issue summons upon the accused Kamal Singha Roy.

To 9.9.2019 for appearance.

**Sd/-
Metropolitan Magistrate,
12th Court, Calcutta.**

The Supreme Court in the judgment under reference has relaxed the procedure for enquiry under section 202 Cr.P.C. in cases related to proceedings under Section 138 of the N.I. Act. But **the Magistrate in this case has not done even the preliminary enquiry, as he has held that C.M.M. had already taken cognizance and as such there was no scope of further examination.** There is absolutely no enquiry even prima facie nor any consideration of any materials on record including documents by the Magistrate issuing process. As such the basic requirement of section 202 Cr.P.C. as held by the Supreme Court in the expeditious trial of cases case (Supra) has not been complied with by the Magistrate. The order passed the magistrate dated 10.07.2019 is not in accordance with law and is thus set aside.

Thus considering the facts and circumstances of the present case, the nature of case pending between the parties, the non-compliance of Section 202 Cr.P.C. by the Magistrate before issuance of process is prima facie an abuse of process of Court.

Accordingly in the interest of justice the orders dated **02.03.2019 and 10.07.2019** in Complaint Case No. CS/13195/2019

pending before the Court of Metropolitan Magistrate, 12th Court, Calcutta, is hereby set aside/quashed.

The matter is remitted to the learned Magistrate for considering the matter a fresh as per the relevant provision of law, under Section 202 Cr.P.C. and as per the guidelines of the Supreme Court in the judgment **Re expeditious trial cases (supra)** referred in this order/judgment without being influenced by the order of this Court.

CRR 158 of 2020 is accordingly disposed of.

There will be no order as to costs.

All connected applications, if any, stand disposed of.

Interim order, if any, stands vacated.

Copy of this judgment be sent to the Trial Court forthwith for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)