

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 1021 of 2019

With

CRAN 1 of 2019

(Old No. CRAN 3142 of 2019)

Usha Agarwalla @ Usha Agarwal

Vs.

M/s. Citicorp Finance (I) Ltd.

For the Petitioner : Mr. Pawan Kumar Gupta,
Ms. Sofia Nesar,
Mr. Santanu Sett.

For the Opposite Party : None.

Heard on : 06.07.2023

Judgment on : 24.07.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the order dated 14.11.2018 and the entire proceeding of complaint case being C/13277/2009 instituted under Section 138 of the Negotiable Instruments Act, 1881 (as amended up-to-date) pending before the Court of the Learned Metropolitan Magistrate, 9th Court at Calcutta.

2. The petitioner's case is that on 18.03.2009, the opposite party filed a complaint before the Learned Chief Metropolitan Magistrate at Calcutta alleging commission of offence under Section 138 of the NI Act against the present petitioner.
3. It has been alleged in the complaint that the petitioner had entered into a loan agreement with the opposite party, amounting to Rs.53,110/- and that in discharge of the aforementioned loan, the petitioner issued a cheque for the same amount, being cheque no. 272827 dated 30th November, 2008 drawn on ICICI Bank Ltd., Bhubaneswar Branch, Unit No. III, Opposite Sriya Talkies, Off. Janpath, Bhubaneswar – 751 001.
4. When the opposite party presented the cheque to his banker, the cheque was returned unpaid along with the memorandum of dishonour containing the remark "Insufficient funds". Thereafter the opposite party issued a demand notice under Section 138(b) of the NI Act dated 13th February, 2009 asking the petitioner to make payment of the aforementioned amount within fifteen days of the receipt of such letter, however, the amount allegedly remained unpaid even after the stipulated period of time and as such the opposite party had to file the complaint under Section 138 of the NI Act.
5. The Learned Chief Metropolitan Magistrate took cognizance of the said complaint vide Order dated 18.03.2009 and was pleased to transfer the said case to the Court of the Learned Metropolitan Magistrate, 9th Court at Calcutta (hereinafter referred to as "learned Trial Court") for hearing and disposal. Accordingly, Complaint Case No. C/13277 of 2009 was instituted against the petitioner.

6. Learned Trial Court was pleased to examine the opposite party herein under Section 200 of Cr.P.C. and was further pleased to issue process in the nature of summons thereby directing the petitioner herein to appear before the learned Trial Court on 29th May, 2009.
7. That even though the petitioner herein resided outside the jurisdiction of the learned Trial Court, the learned Trial Court did not postpone the issue of process as is mandated under Section 202 of the Cr.P.C.
8. The petitioner submits that the petitioner is not the signatory of the cheque, being cheque no. 272827 dated 30th November, 2008 drawn on ICICI Bank Ltd., Bhubaneswar Branch, Unit No. III, Opposite Sriya Talkies, Off. Janpath, Bhubaneswar – 751 001. The husband of the petitioner namely Kailash Agarwalla is actually the signatory of the cheque. Therefore, the entire cause of action does not have any locus standi as it cannot arise against the petitioner herein because the petitioner was not signatory to the cheque which was allegedly dishonoured.
9. On 14.11.2018 when the petitioner was not represented by the learned lawyer, the learned Trial Court by virtue of impugned order issued warrant against the petitioner and fixed 30.03.2019 for execution report.
10. It is submitted that until and unless the warrant is recalled and impugned order is set aside the petitioner shall be suffer irreparable loss and injury.
11. **Mr. Pawan Kumar Gupta, learned counsel for the petitioner** has submitted that the petitioner received the demand notice issued by the

opposite party but before receiving the summons, the petitioner herein, in good faith and bona fide interest, deposited two demand drafts, being DD No. 300971 dated 26th March, 2009 amounting to Rs.26,555/- and DD No. 112527 dated 30th March, 2009 amounting to Rs.26,555/- in favour of the opposite party. The demand drafts amounted to a total of Rs.53,110/- (Rs.26,555/- each) which was the alleged amount of default, has already been paid by the petitioner prior to receiving the copy of summons in the present case and the receipt of the same is already acknowledged by the complainant/opposite party.

12. That even after the payment of the loan amount by the petitioner, the opposite party filed the instant complaint against the petitioner to harass and with malafide intention.

13. Thus the impugned proceeding is otherwise bad in law and liable to be quashed.

14. There is no representation on behalf of the opposite party in spite of due service.

15. The petitioner has filed copies of documents in support of her contention that the total cheque amount has been paid by way of two demand drafts being DD No. 300971 dated 26.03.2009 and DD No. 112527 dated 30.03.2009. The cheque in this case is dated 30.11.2008. As stated in the petition of complaint it was dishonoured on 15.01.2009.

16. Notice was issued on 13.02.2009.

17. Thus, it is clear from the materials on record that **the payment towards the petitioner's liability was not within the notice period.**

18. The Hon'ble Supreme Court in ***Dashrathbhai Trikambhai Patel vs Hitesh Mahendrabhai Patel, in Criminal Appeal No. 1497 of 2022, on 11 October, 2022***, held:-

“30. In view of the discussion above, we summarise our findings below:

(i) For the commission of an offence under Section 138, the cheque that is dishonoured must represent a legally enforceable debt on the date of maturity or presentation;

(ii) If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque;

(iii) When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the cheque as prescribed in Section 56 of the Act. The cheque endorsed with the payment made may be used to negotiate the balance, if any. If the cheque that is endorsed is dishonoured when it is sought to be encashed upon maturity, then the offence under Section 138 will stand attracted;

(iv) The first respondent has made part-payments after the debt was incurred and before the cheque was encashed upon maturity. The sum of rupees twenty lakhs represented on the cheque was not the 'legally enforceable debt' on the date of maturity. Thus, the first respondent cannot be deemed to have committed an offence under Section 138 of the Act when the cheque was dishonoured for insufficient funds; and

(v) The notice demanding the payment of the 'said amount of money' has been interpreted by judgments of this Court to mean the cheque amount. The conditions stipulated in the provisos to Section 138 need to be fulfilled in addition to the ingredients in the substantive part of Section

138. Since in this case, the first respondent has not committed an offence under Section 138, the validity of the form of the notice need not be decided.”

19. In this case, it is clear that the **payment was not made within the statutory period**. So the proceedings under Section 138 N.I. Act is prima facie maintainable.

20. The next contention of the petitioner is that the mandatory provision of Section 202 Cr.P.C. has not been complied with by the learned Magistrate.

21. Section 200 Cr.P.C. lays down:-

“200. Examination of complainant.-A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or- purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re- examine them.”

22. Section 202 Cr.P.C. lays down:-

“202. Postponement of issue of process.

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192,

may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction,] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub- section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub- section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer- in- charge of a police station except the power to arrest without warrant.”

23. The proceedings in this case is under Section 138 of the Negotiable Instruments Act.

24. A Five Judge Bench of the Supreme Court in expeditious trial of cases (for proceedings u/s 138 N.I. Act), on April 16, 2021 has held in respect of compliance of the provision under Section 202 Cr.P.C. in such cases as follows:-

*“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.**”*

25. In *Sunil Todi vs The State of Gujarat, Criminal Appeal No. 1446 of 2021, on 3 December, 2021*, held:-

*“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.**”*

26. In the present case as seen from the order dated 18.03.2009 the Magistrate took evidence on affidavit along with documents under Section 200 Cr.P.C. and considered the case to be suitable for issuing process under Section 202 Cr.P.C. on examination of the documents and the evidence of the complainant on affidavit and being satisfied as to the sufficiency of grounds for proceeding under Section 202 Cr.P.C.

27. Thus the order issuing process on 18.03.2009 passed by the learned Metropolitan Magistrate, 9th Court, Calcutta being in accordance with law **(*Re expeditious trial of cases u/s 138 of the***

N.I. Act (Supra) and Sunil Todi vs The State of Gujarat (Supra)),

needs no interference.

28. The proceeding is under Section 138 N.I. Act. The strict compliance of the provision under Section 202 Cr.P.C. in such cases has been dispensed with by the Hon'ble Supreme Court.
29. By the order under revision the learned Magistrate has issued a warrant of arrest against the petitioner. **Payment of the due amount has been made.** Keeping with the view of the **Hon'ble Supreme Court in re-expeditious trial of the cases under Section 138 N.I. Act** the present revision is disposed of by directing the learned Magistrate to refer this case for **mediation** to the Secretary of the respective District Legal Services Authority.
30. Thus, in the interest of justice and as payment of the cheque amount has already been made by the petitioner, the order under revision issuing warrant of arrest against the petitioner is liable to be set aside.
31. **The revisional application being CRR 1021 of 2019 is accordingly allowed.**
32. The impugned **order dated 14.11.2018 issuing warrant of arrest** against the petitioner in complaint case being C/13277/2009 under Section 138 of the Negotiable Instruments Act, 1881 (as amended up-to-date) pending before the Court of the Learned Metropolitan Magistrate, 9th Court at Calcutta, **is hereby set aside.**
33. The complaint case being C/13277/2009 pending before the Learned Metropolitan Magistrate, 9th Court at Calcutta, to proceed in

accordance with law with an effort to settle the dispute through mediation, considering the present status between the parties.

- 34.** No order as to costs.
- 35.** All connected applications, if any, stands disposed of.
- 36.** Interim order, if any, stands vacated.
- 37.** Copy of this judgment be sent to the learned Trial Court for necessary compliance.
- 38.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)