

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 2371 of 2019

Nisha Hasija

Vs

M/s. Symphony Merchants Pvt. Ltd.

For the Petitioner : Mr. Ayan Bhattacharya,
Mr. Apalok Basu,
Ms. Sahili Bose.

For the Opposite Party : None.

Heard on : 08.02.2023

Judgment on : 02.03.2023

Shampa Dutt (Paul), J.:

The present revision has been preferred praying for quashing of proceedings in connection with Complaint Case No. CS/114550/2016 under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 and corresponding to T.R. No.4984/2016 and now pending before the Court of the learned 6th Metropolitan Magistrate, Calcutta.

The petitioner's case is that the opposite party lodged a complaint against the petitioner stating that the accused no. 1 is a company having its office at C-636, DSIDC, Industrial Area, Narela, Delhi- 110040 and is engaged in the business of Import and Export of goods and the accused nos. 2 and 3 are the directors of the accused no. 1 company and both of them look after day to day business affairs of the accused no. 1 and they are the persons who are fully aware and responsible for the commission of the said offence.

The complainant company had issued a cheque of Rs. 1,00,00,000/- (One Crore only) favouring the accused no. 1 towards loan and the said cheque was duly received, encashed and appropriated by the accused persons.

That as per mutually agreed terms and conditions, the accused persons in discharge of the existing debts and/or liabilities of Rs. 1,00,00,000/- (Rupees One Crore) only due to the complainant

company, the authorized signatory of the accused no. 1 had issued a cheque bearing no. 000808 dated 30.07.2016 drawn on HDFC Bank, 16, Barakhamba Road, Ground Floor, DCM Building, New Delhi-110001 of Rs. 1,00,00,000/- (One Crore Only).

The said cheque was presented within its validity period at the complainant's bank, HDFC Bank Ltd., Stephen House Branch, Kolkata-700001 for encashment but the same was dishonoured by the bank vide memo dated 26.08.2016 bearing the endorsement "ACCOUNT CLOSED".

That such fact of dishonour of the cheque had been communicated to the accused persons by the complainant vide legal notice dated 08.09.2016 which was dispatched on the same date. However in spite of service accused persons have failed and/or neglected to make payment of the said sum of money within the stipulated period.

A copy of the petition of complaint as filed by the opposite party herein annexed and marked "P-1".

Upon filing of the case by the complainant, the learned Chief Metropolitan Magistrate, Calcutta was pleased to take cognizance of the offence through order dated 25.10.2016 and was further pleased to transfer the records to the Court of the learned 6th Metropolitan Magistrate, Calcutta for enquiry and disposal according to law.

After recording the initial deposition of the authorized representative of the Complainant Company as filed by them, the learned 6th Metropolitan Magistrate, Calcutta was pleased to issue process against your petitioners vide order dated 24.02.2016 under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881.

Petitioner states that the allegations made in the complaint are fabricated, false, without any basis and do not constitute the ingredients of the alleged offences so far as the present petitioner is concerned.

The petition of complaint does not fulfill the essential ingredients of Section 141 of the Negotiable Instruments Act, 1881. The petition of complaint has failed to mention the specific role of the petitioner in order to link the petitioner to the offence as alleged in the complaint.

The complaint does not make out any case, much less a prima facie case, a condition precedent to set the criminal law in a motion. The learned Magistrate, without advertent as to whether the allegation in the petition of complaint prima facie makes out an offence in a mechanical manner issued process against the present petitioner.

The said proceeding instituted against the petitioners herein, is a clear abuse of the process of the Court, not maintainable in law and in the interests of justice, is liable to be quashed.

That order of issuing process is also violative of Section 202 of the Code of Criminal Procedure as the petitioner is a resident of Delhi and the said place is lying outside the territorial jurisdiction of the Court of the learned Chief Metropolitan Magistrate, Calcutta. It is further submitted by the petitioner that mere mentioning of the residential address will not relax the duty and responsibility of the learned Magistrate who issued the process to compulsory enquire as per the mandatory provision laid down in Section 202 of the Code of Criminal Procedure. The amended Section 202 of the Code of Criminal Procedure denotes that any Magistrate on receipt of a complaint shall, in cases where the accused is residing at a place beyond the area in which he exercises his jurisdiction, shall postpone the issuance of process against the accused person and either inquire into the case himself or direct that an investigation be made by a police officer or such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. The said mandate of law has to be complied with care and caution and not to be treated as an empty formality.

Mr. Ayan Bhattacharya, learned counsel for the petitioner has submitted that the allegations made in the petition of complaint are fabricated, false, without any basis and do not constitute the ingredients of the alleged offences.

The petition of complaint does not make any specific averment against your petitioner.

The complaint does not make out any case, much less a prima facie case, a condition precedent to set the criminal law in motion.

The learned Magistrate, without advertent as to whether the allegations in the petition of complaint prima facie make out an offence, in a mechanical manner issued process against the petitioners.

The said proceeding instituted against the petitioners herein, is a clear abuse of the process of the Court, not maintainable in law and in the interest of justice, is liable to be quashed.

Service upon the opposite party has been refused and there has been no representation on behalf of the opposite party.

Heard the learned counsel for the petitioner. Perused the materials on record. Considered.

The orders relevant in this case are:-

Case No. CS-114550/16

Order No.1

Dated 25.10.2016

Complaint filed 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 6th Court for enquiry and disposal according to law.

Dictated.

**Sd/-
Chief Metropolitan Magistrate
Calcutta**

Dated 24.02.2016

Today is fixed for 200 Cr.P.C.

Complainant is present and files an affidavit along with documents u/s. 138 of Negotiable Instrument Act. Perused the same. It appears to me that complainant has been able to establish prima facie case for offence punishable u/s. 138/141 of Negotiable Instrument Act, 1881 against the accused/s.

Accordingly, issue summons upon the accused person/s.

Fixing 05.05.2017 for S/R and appearance.

Requisite accordingly.

**Sd/-
Metropolitan Magistrate
6th Court, Calcutta**

The only address of the petitioner is of New Delhi.

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.”

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.”

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

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.”

In the present case as seen from the order, 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.

Thus the order under revision dated 24.02.2016 passed by the learned Metropolitan Magistrate, 6th Court, Calcutta being in accordance with law **(Re expeditious trial of cases u/s 138 of the N.I. Act (Supra))**, needs no interference.

CRR 2371 of 2019 is dismissed.

There will be no order as to costs.

All connected Application stand disposed of.

Interim order if any stands vacated.

Copy of this judgment be sent to the learned 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.)