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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 10.05.2023
Pronounced on: 04.07.2023

+ **CRL.M.C. 5274/2019 & CRL.M.A. 38289/2019**

G. MALARVIZHI & ORS

..... Petitioners

Through: Mr. Atul Guleria, Mr. Aashish
Chojar, Mr. Shivan Tyagi,
Advocates

versus

MR. P. SAMPATH & ANR.

..... Respondents

Through: Ms. Meenakshi Dahiya, APP
for R-1.
Mr. Rohit Jain, Advocate for
R-2.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The petitioners have preferred the present petition under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C') for setting aside the summoning order dated 10.05.2018, passed by learned Metropolitan Magistrate-02, Patiala House Courts, New Delhi in criminal complaint no. 9794/2018, titled as '*P. Sampath v. M/s Malar Homes & Others*' whereby the petitioners were summoned for the offences punishable under Section 138 read with Section 141 of the



Negotiable Instruments Act, 1881.

2. The petitioners herein have been arraigned as accused no. 3 to 5 in the complaint under Section 138 of Negotiable Instruments Act filed by respondent no. 1. Brief facts of the present case, as disclosed from the complaint, are that accused no.2 to 5 had approached the complainant and had requested for grant of a loan of Rs. 70,00,000/- for the purpose of developing the land at Hastinapuram, Chennai. Accordingly, a loan agreement dated 20.03.2014 for Rs. 70,00,000/- was entered into between the complainant and accused no. 1 i.e. M/s. Malar Homes represented by accused no. 2. Subsequently, the accused persons had defaulted in payment of principal amount as well as the interest on the above-mentioned loan amount. After regular follow ups and requests by the complainant, the accused persons had issued a cheque bearing no. 452597 of Rs. 1,32,00,000/- (Rupees One Crore and Thirty-Two Lakhs) dated 06.02.2018, drawn on Punjab National Bank, Tiruchirapalli, Tamil Nadu to the complainant towards discharge of principal debt liability including accrued interest. Following that, the complainant had presented the said cheque for collection on 23.02.2018 at his bank i.e. HDFC Bank, Kailash Building, Kastura Gandhi Marg, New Delhi, but the same upon presentation, had returned unpaid on 26.02.2018. Thereafter, on 23.03.2018, the complainant had sent a legal notice to the accused persons to pay the dishonoured cheque amount within a period of 15 days of the receipt of legal notice. It is alleged that accused persons had sent a false reply dated 25.04.2018 to the legal notice of the complainant. Therefore, the present complaint



was filed by the complainant and the accused persons were summoned by the learned MM *vide* summoning order dated 10.05.2018.

3. Learned counsel for the petitioners argues that it is not clear as to whether the courts in Delhi have jurisdiction to try the present complaint as the respondent had not disclosed in his complaint as to where he had maintained his bank account, so as to attract territorial jurisdiction of the Trial court concerned. It is also argued that the present petitioners were not in-charge of day-to-day affairs of the accused firm, nor were they signatory to the cheque in question. It is argued that petitioner no. 2 and 3 had resigned much before the issuance of the cheque and, thus, they could not have been summoned by the learned MM. It is also argued that the impugned summoning order suffers from illegality as no inquiry under Section 202 of Cr.P.C. has been conducted by the learned MM before issuing summons to the petitioners herein, who are residents of Tamil Nadu which is outside the jurisdiction of Delhi, which was compulsory as per judgment of ***Abhijit Pawar v. Hemant Madhukar Nimbalkar*** (2017) 3 SCC 528. Lastly, it is stated that respondent has also concealed the fact that the loan amount was duly secured by way of mortgage and the respondent deliberately chose not to enforce to the same.

4. *Per contra*, learned counsel for complainant/respondent no. 1 argues that in the reply to legal notice dated 25.04.2018 issued on behalf of the accused persons, it has been mentioned and admitted that the petitioners were partners of the accused firm. It is stated that the present case is triable in the courts of Delhi only since the cheque in



question had been dishonoured and had been returned unpaid in the bank situated in Delhi and within the jurisdiction of Court before which the case is pending. It is stated that petitioners have not placed any document on record which can clearly substantiate their ground of having retired from the partnership firm and the retirement deed being relied upon them appears to be manipulated in view of different dates mentioned therein. It is also stated that as per Section 63 of the Indian Partnership Act, 1932, when a partnership firm is reconstituted, the information has to be given to the Registrar, which has not been shown to be complied with by the petitioners in the present case. It is argued that Section 202 of Cr.P.C. is not applicable to the proceedings initiated under Section 138 of Negotiable Instruments Act. Lastly, it is stated that enforcement of mortgage deed is a civil remedy whereas proceedings under Section 138 of Negotiable Instruments Act for dishonour of cheque is a criminal liability or remedy. It is, therefore, stated that the contentions raised before this Court by the petitioners are all triable issues and the present petition deserves to be dismissed.

5. The arguments addressed by both sides have been heard and the material on record has been perused.

6. *Firstly*, in the present case, the primary contention raised on behalf of petitioners is that the impugned summoning order suffers from illegality since Section 202 Cr.P.C. mandates the postponement of the issuance of process where an accused resides beyond the jurisdiction of the territory of the Court and despite the same, no inquiry was carried out by the learned MM in the present case. As far



as this contention is concerned, this Court takes note of the decision of *Sunil Todi v. State of Gujarat* 2021 SCC OnLine SC 1174, whereby a similar ground was raised before the Hon'ble Apex Court in the appeals filed against orders of Hon'ble High Court of Gujarat dismissing the petitions under Section 482 Cr.P.C., and the Hon'ble Apex Court had discussed the relation between Section 202 of Cr.P.C. and Section 138 of Negotiable Instruments Act. The relevant observations contained in the said judgment are reproduced herein-under for reference:

“37. Under Sub-Section (1) of Section 202, a Magistrate upon the receipt of a complaint of an offence of which he/she is authorized to take cognizance is empowered to postpone the issuance of process against the accused and either (i) enquire into the case; or (ii) direct an investigation to be made by a police officer or by such other person as he thinks fit. The purpose of postponing the issuance of process for the purposes of an enquiry or an investigation is to determine whether or not there is sufficient ground for proceeding. However, it is mandatory for the Magistrate to do so in a case where the accused is residing at a place beyond the area in which the Magistrate exercises jurisdiction. The accused persons in the present case reside at Aurangabad while the complaint under Section 138 was filed before the Magistrate in Mundra. The argument of the appellants is that in these circumstances, the Magistrate was duty bound to postpone the issuance of process and to either enquire into the case himself or to direct an investigation either by a police officer or by some other person. Section 203 stipulates that if the Magistrate is of the opinion on considering the statement on oath, if any, of the complainant and of the witnesses, and the result of the enquiry or investigation if any under Section 202 that there is no sufficient ground for proceeding, he shall dismiss the complaint recording briefly his reasons for doing so. The requirement of recording reasons which is specifically incorporated in Section 203 does not find place in Section 202. Section 204 which deals with the issuance



of process stipulates that if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, he may issue (a) in a summons case, a summons for attendance of the accused; (b) in a warrant case, a warrant or if he thinks fit a summons for the appearance of the accused. These proceedings have been interpreted in several judgments of this Court. For the purpose of the present case, some of them form the subject matter of the submissions by the appellants and the second respondent.

41. While noting that the requirement of conducting an enquiry or directing an investigation before issuing process is not an empty formality, the Court relied on the decision in *Vijay Dhanuka* which had held that **the exercise by the Magistrate for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused is nothing but an enquiry envisaged under Section 202 of the Code.**

42. In *Birla Corporation Ltd. v. Adventz Investments and Holdings*, the earlier decisions which have been referred to above were cited in the course of the judgment. The Court noted:

“26. The scope of enquiry under this section is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should be issued or not under Section 204 CrPC or whether the complaint should be dismissed by resorting to Section 203 CrPC on the footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any. **At the stage of enquiry under Section 202 CrPC, the Magistrate is only concerned with the allegations made in the complaint or the evidence in support of the averments in the complaint to satisfy himself that there is sufficient ground for proceeding against the accused.**”

45. In this backdrop, it becomes necessary now to advert to an order dated 16 April 2021 of a Constitution Bench in *Re : Expeditious Trial of Cases under Section 138 of N.I. Act 1881*. The Constitution Bench notes “the gargantuan pendency of



complaints filed under Section 138” and the fact that the “situation has not improved as courts continue to struggle with the humongous pendency”. The court noted that there were seven major issues which arose from the responses filed by the State Governments and the Union Territories including in relation to the applicability of Section 202 of the CrPC. Section 143 of the NI Act provides that Sections 262 to 265 of the CrPC (forming a part of Chapter XXI dealing with summary trials) shall apply to all trials for offences punishable under Section 138 of the NI Act. On the scope of the inquiry under Section 202 CrPC in cases under Section 138 of the NI Act, there was a divergence of view between the High Courts. Some High Courts had held that it was mandatory for the Magistrate to conduct an inquiry under Section 202 CrPC before issuing process in complaints filed under Section 138, while there were contrary views in the other High Courts. In that context, the Court observed:

“10. Section 202 of the Code confers jurisdiction on the Magistrate to conduct an inquiry for the purpose of deciding whether sufficient grounds justifying the issue of process are made out. The amendment to Section 202 of the Code with effect from 23.06.2006, vide Act 25 of 2005, made it mandatory for the Magistrate to conduct an inquiry before issue of process, in a case where the accused resides beyond the area of jurisdiction of the court. (See : Vijay Dhanuka v. Najima Mamtajl, Abhijit Pawar v. Hemant Madhukar Nimbalkar and Birla Corporation Limited v. Adventz Investments and Holdings Limited). There has been a divergence of opinion amongst the High Courts relating to the applicability of Section 202 in respect of complaints filed under Section 138 of the Act. Certain cases under Section 138 have been decided by the High Courts upholding the view that it is mandatory for the Magistrate to conduct an inquiry, as provided in Section 202 of the Code, before issuance of process in complaints filed under Section 138. Contrary views have been expressed in some other cases. It has been held that merely because the accused is residing outside the jurisdiction of the court, it is not necessary for the Magistrate to postpone the issuance of process in each and every case. Further, it has also been



held that not conducting inquiry under Section 202 of the Code would not vitiate the issuance of process, if requisite satisfaction can be obtained from materials available on record.

11. The learned Amici Curiae referred to a judgment of this Court in K.S. Joseph v. Philips Carbon Black Ltd. where there was a discussion about the requirement of inquiry under Section 202 of the Code in relation to complaints filed under Section 138 but the question of law was left open. In view of the judgments of this Court in Vijay Dhanuka (supra), Abhijit Pawar (supra) and Birla Corporation (supra), the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot be dispensed with. The learned Amici Curiae recommended that the Magistrate should come to a conclusion after holding an inquiry that there are sufficient grounds to proceed against the accused. We are in agreement with the learned Amici.”

46. 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.**

47. 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.

48. The order passed by the Magistrate cannot be held to be invalid as betraying a non-application of mind...”

(Emphasis supplied)

7. Thus, in view of the aforesaid decision of Hon’ble Apex Court, the Magistrate while considering the complaint in relation to offence under Section 138 of Negotiable Instruments Act under Section 202 of Cr.P.C., in case where an accused resides outside the jurisdiction of the Court, is not required to examine the witness on oath for conducting the enquiry as contemplated under Section 202 of Cr.P.C., rather can itself advert to the documents and evidence by way of affidavit filed on record by the complainant and reach a satisfaction as to whether the accused should be summoned or not.

8. A perusal of the impugned order reveals that the learned MM has considered the contents of the complaint, the documents annexed thereto, the affidavit filed by the complainant as well as the submissions made by the learned counsel for the complainant and only thereafter, having been satisfied that *prima facie* case existed against the accused persons, had issued summons to the accused persons. Having considered the same, this Court does not find any illegality or perversity in the impugned order as far as conformity of the same with Section 202 of Cr.P.C. is concerned, especially in light of the judicial



precedents of Hon'ble Apex Court discussed above.

9. *Secondly*, as regards the issue of jurisdiction, it is not in dispute that the cheque in question was presented by the complainant/respondent no. 1 at HDFC Bank, Kailash Building, No. 26, Kasturba Gandhi Marg, New Delhi-110001 which is situated within the territorial jurisdiction of Delhi and the cheque had got dishonoured upon presentation with the said bank. Thus, the courts in Delhi would have the jurisdiction to try the present complaint.

10. *Thirdly*, it was argued before this Court that petitioner no. 2 and 3 had resigned from the accused firm before the issuance of cheque in question dated 06.02.2018 and its subsequent dishonor on 26.02.2018. However, it has been mentioned in the present petition that the cheque had been issued at the time of obtaining loan i.e. in the year 2014 to cover the shortfall, if any, after the loan amount would be recovered by way of enforcement of mortgage deed. Therefore, it is the case of petitioners themselves that the cheque in question was undated/post-dated cheque given to the respondent no. 1 by the petitioners at the time of obtaining loan.

11. Furthermore, it has been contended that petitioner no. 2 had resigned from the accused firm *vide* Partnership Retirement and Reconstitution Deed dated 01.01.2016 and thereafter, on 30.01.2018, petitioner no. 3 had also resigned from the firm *vide* Partnership Retirement and Reconstitution Deed of even date. In this regard, this Court has perused Annexure D of the present petition which is being relied upon to contend that petitioner no. 2 had resigned from the



accused firm on 01.01.2016. Upon perusal, as rightly pointed out by the learned counsel for respondent no. 1, though the said Deed is dated 01.01.2016, at the top left corner, there is a written marking which shows the date as 22.09.2015. Upon further perusal of Annexure E i.e. the copy of the Deed dated 30.01.2018, it can be observed that petitioner no. 3 had purportedly resigned as a partner from the firm on the said date which is a week before 06.02.2018 i.e. the date of issuance of cheque. However, the reply to the legal notice dated 25.04.2018 issued on behalf of the accused persons mentions petitioner no. 3 as one of the partners in the partnership firm/accused no. 1.

12. As also argued by learned counsel for respondent no. 1, no documents pertaining to any information relating to retirement of partners or reconstitution of firm having been forwarded to the Registrar under Section 63 of Indian Partnership Act, 1932 has been placed on record by petitioner no. 2 and 3 to corroborate their version of having resigned by virtue of above-mentioned Partnership Retirement and Reconstitution Deeds.

13. In view of the aforesaid facts and circumstances, this Court can reach only one conclusion that the issues raised before this Court are all triable issues, which would require detailed consideration of the documents as per law, which may include all the relevant document pertaining to the resignations if any of the petitioners, and as to what role they had in issuance of cheque in question and dishonour of the same.

14. However, as *prima facie* apparent from the records of the case, the



complainant in the complaint under Section 138 of Negotiable Instruments Act has specifically averred that the accused firm represented by its Managing Director i.e. accused no. 2 along with the other accused persons, including the petitioners, had approached the complainant for grant of loan and all the partners in connivance with each other had issued the cheque in question for repayment of the said loan. It was also averred that the present petitioners were active partners of the accused firm and, thus, were liable for the issuance as well as dishonour of the cheque in question.

15. In view of the reasons recorded in the preceding discussion, *at this stage*, this Court cannot hold anything contrary to what has been pleaded by the complainant as the same would require scrutiny of the relevant materials and documents as well as examination of witnesses by the concerned Court during the course of trial. The petitioners have failed to bring on record any unimpeachable material or material of sterling quality to show that they had resigned from the accused firm or were not responsible for day-to-day affairs of the firm when the cheque was issued or dishonored or that the dishonoring of cheque in question was not attributable to any negligence or connivance or consent on their part. While holding so, this Court also remains cautious of the observations made by the Hon'ble Apex Court in ***S.P. Mani & Mohan Dairy v. Dr. Snehalatha Elangovan*** 2022 SCC OnLine SC 1238, which read as under:

“33. Thus, the legal principles discernible from the aforesaid decision of this Court may be summarised as under:—



(b) It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole;

(c) If the substance of the allegations made in the complaint fulfil the requirements of Section 141, the complaint has to proceed in regards the law.

(d) In construing a complaint **a hyper-technical approach should not be adopted so as to quash the same.**

(e) The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in the enactment of Sections 138 and 141 respectively should be kept in mind by the Court concerned.

(g) The **power of quashing should be exercised very sparingly** and where, read as a whole, the factual foundation for the offence has been laid in the complaint, it should not be quashed...

* * * *

47. Our final conclusions may be summarised as under:—

a.) The primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each and every transaction. On the other hand, the first proviso to sub-section (1) of Section 141 of the Act clearly lays down that if the accused is able to prove to the satisfaction of the Court that the offence was committed without his/her knowledge or he/she had exercised due diligence to prevent the commission of such offence, he/she will not be liable of punishment.

d.) If any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he/she is really not concerned with the issuance of the cheque, **he/she must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible**



material or acceptable circumstances to substantiate his/her contention. He/she must make out a case that making him/her stand the trial would be an abuse of process of Court.”

(Emphasis supplied)

16. In view thereof, having found no reasons to interfere with the impugned summoning order, the present petition stands dismissed. Pending applications, if any, are also dismissed accordingly.

17. It is however clarified that the observations made herein-above are for the sole purpose of deciding the present petition and the same shall not have any effect on the merits of the case during trial.

18. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

JULY 4, 2023/zp

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