

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

% *Date of decision : 27.03.2023*

+ **CRL.M.C. 2120/2023**

VINOD KUMAR

..... Petitioner

Through: Mr. Rajat Sharma, Advocate.

versus

JITENDER KUMAR

..... Respondent

Through: Mr. Karan Bajaj, Advocate.

CORAM:

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

RAJNISH BHATNAGAR, J (ORAL)

CRL.M.A. 8039/2023

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

CRL.M.C. 2120/2023

1. The present petition under Section 482 Cr.P.C has been filed by the petitioner seeking the following reliefs:-

“A. Call for records in Complaint case No. CC NI ACT 31131/2022 from the trial court of Sh. Sunil Gupta Ld. M.M. Dwarka Courts, Delhi.

B. Pass an order/direction for setting aside the order dated 02/03/2023 and quash the trial court proceeding pending before

Ld. M.M. in the above mentioned case.

C. Pass any further order, order or direction which this hon'ble court may deem fit and proper in the facts and circumstances of the present case in the interest of justice."

2. The complainant (respondent herein) had instituted a complaint under Section 138 of Negotiable Instruments Act, 1881 against the present petitioner in respect of non-payment against one dishonoured cheque for the amount of Rs. 10,00,000/- issued by petitioner in favour of the respondent.

3. The Metropolitan Magistrate vide Order dated 15.11.2022 issued summons under Section 138 of Negotiable Instruments Act, 1881 requiring the petitioner to attend the Court and vide impugned Order dated 02.03.2023, the matter was put up for framing of notice on 25.03.2023.

4. The petitioner feeling aggrieved, filed the present petition invoking jurisdiction of this Court U/s 482 Cr.P.C.

5. It has been mainly argued by the Ld. Counsel for the petitioner that the complaint filed by the complainant under Section 138 of Negotiable Instruments Act against the petitioner is false and frivolous and the same has been made to extort money from the petitioner on the basis of stolen cheque. It is further submitted that para 8 of the complaint and para 9 of the evidence affidavit claims that the petitioner had already cleared the entire loan way back in November 2021 and therefore, the case of the respondent is based upon assumptions. Ld. Counsel for the petitioner has contended that the

petitioner had replied to the said legal notice vide reply dated 08.09.2022 and cleared his stand regarding the liability against the said cheque, however, the complaint was filed on 14.10.2022 i.e., after a period of 30 days, thus, the case of the respondent is not maintainable and it cannot be assumed that there exists a legally enforceable debt or liability.

Ld. Counsel for the petitioner in support of his contentions has placed reliance on the following judgments:

- ***Bankimchandra Rajivbhai Patel vs. Chinubhai Bachubhai Chauhan (Criminal Appeal No. 1294 of 2010, decided on 13.02.2012 by High Court of Gujarat)***
- ***Parveen Mehta vs. Vishal Joshi (CRM-A-1997-MA-2015, decided on 16.05.2022 by High Court of Punjab & Haryana)***

6. On the contrary, Learned counsel for the respondent has pointed out that the cheque in question was presented within its validity period, the complainant got the intimation of cheque being dishonored vide return memo dated 14.07.2022 and subsequently, the legal notice was issued on 26.08.2022. He submitted that the petitioner still failed to make any payment and knowing well that his cheque will not be honoured by the drawee bank and that there is not sufficient balance in the Bank account, issued the cheque in question. He further submitted that the presumption under Section 139 N.I Act includes a presumption that there exists a legally enforceable debt and liability,

and therefore, no case for quashing of the complaint case and the proceedings emanating therefrom is made out.

7. As far as the judgments relied upon by the Ld. Counsel for the petitioner are concerned, there is no dispute with regard to the proposition of law laid down in the said judgments that when an accused is able to rebut the presumption and raise probable defence, the burden shifts on the complainant to prove that the cheque in question was given towards discharge of legally recoverable debt or liability, but with due regard, the same are not applicable to the facts of the present case as the same is a matter of trial and the High Court cannot usurp the powers of the Metropolitan Magistrate and entertain a plea of accused, as to why he should not be tried under Section 138 of the N.I. Act.

8. Now coming to the legal position in this case and taking into consideration the various provisions of Cr.PC which have been discussed in various judgments time and again demonstrate that the Negotiable Instruments Act, provides sufficient opportunity to a person who issues the cheque. Once a cheque is issued by a person, it must be honoured and if it is not honoured, the person is given an opportunity to pay the cheque amount by issuance of a notice and if he still does not pay, he is bound to face the criminal trial and consequences. It is seen in many cases that the petitioners with malafide intention and to prolong the litigation raise false and frivolous pleas and in some cases, the petitioners do have genuine defence, but instead of following due procedure of law, as provided

under the N.I. Act and the Cr.PC, and further, by misreading of the provisions, such parties consider that the only option available to them is to approach the High Court and on this, the High Court is made to step into the shoes of the Metropolitan Magistrate and examine their defence first and exonerate them. The High Court cannot usurp the powers of the Metropolitan Magistrate and entertain a plea of accused, as to why he should not be tried under Section 138 of the N.I. Act. This plea, as to why he should not be tried under Section 138 of the N.I. Act is to be raised by the accused before the Court of the Metropolitan Magistrate under Section 251 of the Cr.PC & under Section 263(g) of the Cr.PC.

9. The offence under Section 138 of the N.I. Act is an offence in the personal nature of the complainant and since it is within the special knowledge of the accused as to why he is not to face trial under section 138 N.I. Act, he alone has to take the plea of defence and the burden cannot be shifted to complainant. There is no presumption that even if an accused fails to bring out his defence, he is still to be considered innocent. If an accused has a defence against dishonour of the cheque in question, it is he alone who knows the defence and responsibility of spelling out this defence to the Court and then proving this defence is on the accused. Once the complainant has brought forward his case by giving his affidavit about the issuance of cheque, dishonour of cheque, issuance of demand notice etc., he can be cross-examined only if the accused makes an application to the Court as to, on what point he wants to cross examine the witness(es)

and then only the Court shall recall the witness by recording reasons thereto.

10. Sections 143 and 145 of the N.I. Act were enacted by the Parliament with the aim of expediting trial in such cases. The provisions of summary trial enable the respondent to lead defence evidence by way of affidavits and documents. Thus, an accused who considers that he has a tenable defence and the case against him was not maintainable, he can enter his plea on the very first day of his appearance and file an affidavit in his defence evidence and if he is so advised, he can also file an application for recalling any of the witnesses for cross-examination on the defence taken by him.

11. In view of the procedure prescribed under the Cr.PC, if the accused appears after service of summons, the learned Metropolitan Magistrate shall ask him to furnish bail bond to ensure his appearance during trial and ask him to take notice under Section 251 Cr.PC and enter his plea of defence and fix the case for defence evidence, unless an application is made by an accused under Section 145(2) of N.I. Act for recalling a witness for cross-examination on plea of defence. If there is an application u/s 145(2) of N.I. Act for recalling a witness of complainant, the court shall decide the same, otherwise, it shall proceed to take defence evidence on record and allow cross examination of defence witnesses by complainant. Once the summoning orders in all these cases have been issued, it is now the obligation of the accused to take notice under Section 251 of Cr. PC., if not already taken, and enter his/her plea of defence before the

concerned Metropolitan Magistrate's Court and make an application, if they want to recall any witness. If they intend to prove their defence without recalling any complainant witness or any other witnesses, they should do so before the Court of Metropolitan Magistrate.

12. As far as the contention of the Ld. Counsel for the petitioner that there is a delay in filing the complaint, does not cut much ice at this stage as the Ld. MM while summoning the petitioner vide Summoning Order dated 15.11.2022, has duly observed as follows:

*“On consideration of the complaint, annexed documents and the verification affidavit of the complainant in the light of law laid down in **A.C Narayanan vs. State of Maharashtra (2014) 11 SCC 790** this Court is of the opinion that prima facie there are sufficient grounds for proceeding against the accused person for the commission of offence under Section 138 Negotiable Instruments Act. The complaint is filed within the period of limitation as prescribed under Section 142(1)(b) of the Negotiable Instruments Act. In terms of inquiry conducted under Section 202 CrPC, all the statutory requirements have been complied with.”*

13. Ld. Counsel for the petitioner has further contended that the cheque in question got stolen and the complainant/ respondent is trying to extort money from him by misusing the said stolen cheque. In my opinion, this contention appears to be a mere bald allegation bereft of any details regarding date, place or time as to when the cheque in question was got stolen and even if the petitioner is to be believed that the cheque was stolen from him, it is really shocking that he has failed to lodge a single police complaint regarding the same and has remained silent until the complaint got filed against him.

14. Therefore, I find no force in the contentions of the Ld. Counsel for the petitioner and accordingly, the present petition along with pending application, if any, stands dismissed being devoid of any merits. However, the Trial Court shall certainly consider and deal with the defence of the petitioner in accordance with law.

RAJNISH BHATNAGAR, J

MARCH 27, 2023/p



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