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

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Reserved on: 05.07.2023
Pronounced on: 12.07.2023

+ **CRL.M.C. 2933/2019**

ASHOK KUMAR GUPTA AND ANR. Petitioners

Through: Mr. Saraswata Mohapatra,
Advocate

versus

ANIL GUPTA Respondent

Through: Mr. Avadh Kaushik, Advocate

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The petitioner has preferred the present petition under Section 482 of the Criminal Procedure Code, 1973 ('Cr.P.C.') for setting aside the impugned summoning order dated 04.12.2017 passed by the learned Metropolitan Magistrate, Rohini (North) District Courts, Delhi in Criminal Complaint No. 5235/2017 titled as '*Anil Gupta Vs. M/s YMS Mobitech Pvt. Ltd. & Ors*' whereby the petitioners had been summoned for the offences punishable under Section 138 read with Section 141, Negotiable Instruments Act, 1881 ('NI Act').
2. The petitioners herein had been arraigned as accused no. 3 and 4 in the complaint under Section 138 of NI Act filed by respondent.



3. Briefly stated, as disclosed from the complaint, the accused persons had approached the complainant and authorized him to work as their super-distributor for which complainant had invested a substantial amount of Rs.1,04,33,075/- (Rupees one crore four lakhs thirty thousand and seventy-five only) with accused no. 1 i.e., M/s YMS Mobitech Pvt. Ltd. Since a substantial amount had accumulated in favour of the complainant, accused had issued a cheque bearing no. 002027 dated 17.08.2017 for a sum of Rs. 14,33,075/- (Rupees fourteen lakh thirty-three thousand and seventy-five Only) drawn on HDFC Bank Ltd. Stephen House, 4, BBD Bag, East Kolkata-700001, West Bengal with signature of accused no. 2 to partly discharge the aforesaid liabilities. The complainant had presented the cheque with his bank, i.e., HDFC Bank Ltd., Northex Mall, Sector 9, Rohini, Delhi; however, the same had returned unpaid *vide* memo dated 25.09.2017. Accordingly, the complainant had sent a legal notice of demand dated 25.10.2017 to the accused persons upon dishonouring of cheque, calling upon the accused persons to make the payment but no reply or payment was made. Therefore, the present complaint was filed by the complainant before Rohini (North) District Courts, Delhi and the accused was summoned by the learned MM *vide* summoning order dated 04.12.2017.

4. Learned counsel for the petitioners submits 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.

5. *Per contra*, learned counsel for complainant/respondent argues that the present petition has been preferred on the ground of non-compliance of Section 202 Cr.P.C. which is misconceived and vexatious. Further, it is submitted that provisions of Section 202 Cr.P.C. does not stipulate a specific mode of inquiry. It is submitted that the issuance of summons against the petitioners and the impugned order is legal without any bias or infirmity. Further, learned counsel submits that these are specific averments in the complaint filed under Section 138 read with Section 141 of NI Act before the learned Trial Court in conformity with the pre-requisite conditions as mentioned in the judgment of ***K.K. Ahuja v. V.K. Vora*** (2009) 10 SCC 48. It is therefore, submitted that the contentions raised by the petitioners are all triable issues and the present petition deserves to be dismissed.

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

7. The primary contention raised on behalf of petitioners is that the learned Trial Court had failed to carry out inquiry as per Section 202 Cr.P.C. To appreciate this contention, Section 202 of Cr.P.C. is reproduced herein under:-

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, 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.

8. In *Sunil Todi v. State of Gujarat* 2021 SCC OnLine SC 1174, the Hon'ble Apex Court had discussed the relation between Section 202 of Cr.P.C. and Section 138 of NI 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 briefly recording 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)

9. Thus, as held by Hon’ble Apex Court, the Court while considering the complaint in relation to offence under Section 138 of Negotiable Instruments Act, in case where an accused resided outside the jurisdiction of the Court, is not required to examine the witness on oath for conducting the inquiry 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 satisfaction as to whether the accused should be summoned or not. While holding so, the Hon’ble Apex Court had also taken note of the provisions contained in Section 145 of NI Act, which reads as under:

145. Evidence on affidavit.-

(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.



10. Thus, as per Section 145(1) of the Negotiable Instruments Act, the evidence of complainant may be given by him on affidavit, and for summoning of accused under Section 138 Negotiable Instruments Act, recording of statements under Sections 200 and 202 Cr.P.C., is not required. [Ref: **Re.: Expeditious Trial of Cases Under Section 138 N.I. Act 1881 AIR 2021 SC 1957**]

11. Having examined the settled position of law, a perusal of the impugned order reveals that the learned MM has considered the pre-summoning evidence by way of affidavit, contents of the complaint, as well as other relevant documents, and only thereafter, having been satisfied that *prima facie* case existed against the accused persons, had issued summons to the accused persons.

12. 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.

13. 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.

14. 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.

15. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

JULY 12, 2023/zp