

12.04.2024
Serial no.5
Piya
Court No.30

CRR 53 of 2022

**Harish Bagla
Vs.
Sharma Exports**

For the petitioner : Mr. Mayukh Mukherjee,
Mr. Dipak Chatteraj,
Mr. D. Chakraborty,
Ms. Patrali Ganguly,
Mr. Rishav Jain.

For the Opposite Party : Mr. Biswajit Tiwari.
(Through virtual mode)

1. The present revision has been preferred praying for quashing of proceedings pending in connection with Complaint Case No. 60C/2017 under Section 138 of the Negotiable Instruments Act, now pending before the Court of the Learned Judicial Magistrate, 3rd Court, Malda and all orders passed therein in connection with the above mentioned complaint case.
2. **The petitioner was working for gain as the Managing Director of Amrit Feeds Limited which is Company registered within the meaning of the Companies Act, 2013.**
3. A complaint was preferred by the Opposite Party herein with the Court of Learned Chief Judicial Magistrate, Malda therein alleging offences committed by the Petitioner

punishable under Section 138 of the Negotiable Instruments Act, being Complaint Case No. 60C of 2017.

4. It is submitted by the petitioner that **the cheque was issued in the name of the Company, named and styled as Amrit Feeds Limited**, but the said Company has till date not been impleaded as an Accused.
5. It has been categorically alleged by the said Opposite Party that the said cheque was in discharge of a purported legally enforceable debt of the said Company, yet said Company has not been made an accused in the instant case, which is absolutely essential for a case under the Negotiable Instruments Act.
6. It is further submitted that the Learned Judicial Magistrate, 3rd Court Malda on receipt of the case record and without taking into consideration, the mandatory requirements enshrined and envisaged under **Section 202** of the Code of Criminal Procedure, was pleased to issue process under Section 204 of the Code of Criminal Procedure against the Accused Person/Petitioner herein **who resides beyond the territorial jurisdiction of the learned Court**.
7. From the petition of Complaint it appears that the only address of the petitioner/accused is as follows:-

*Harish Bagla, resident of 6, Ashoka Road,
Alipore, **Kolkata – 700 027.***
8. Thus admittedly the accused's only address is clearly is beyond the jurisdiction of the trial Court being the **Court at District – Malda**.

9. Section 200 of 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.”

10. Section 202 of 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.”

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

12. 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.”*

13. Thus Section 202(2) Cr.P.C. is not applicable in the present proceedings which is under Section 138 N.I. Act.
14. It is also seen that in paragraph 2 of the petition of complaint that the Complainant/Opposite party has stated that he has filed the present complaint against **the accused person as proprietor.**
15. The cause title in the petition of complaint is as follows:-
Harish Bagla, Managing Director of Amrit Feeds Limited.
16. **In Paragraph 3 it is stated:-**
“That the accused person approached the complainant **to supply Soya sales for his company** on credit basis.”

17. Document annexed to the supplementary affidavit filed by the petitioner shows that the complainant served **Notice** dated 30.11.2016 under Section 138 N.I. Act **upon the Petitioner and also the Company 'Amrit Feeds Limited'**. Copy of the cheque dated 17.08.2016 shows that the said **cheque was also issued by the petitioner on behalf of the company and not from his personal account.**
18. Thus not impleading the company in this case along with the petitioner, being the Managing Director of the complaint, makes the complaint in this case not maintainable.
19. The Supreme Court in ***Himanshu -versus- B. Shivamurthy & Another, (2019) 3 SCC 797, on January 17, 2019,*** held:-

*“11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. **The complaint was lodged only against the appellant without arraigning the company as an accused.***

*12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company **as well as the company**, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.*

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.”

20. The facts in the present case is very similar to the case, in ***Himanshu vs. B. Shivamurthy & Anr. (Supra)***.

21. In the present case:-

a) The company has not been made an accused nor was any notice served upon the company, though the cheque was issued on behalf of the company.

b) The petitioner has been made an accused as the person, who signed and issued the cheque.

22. Therefore, in the absence of the company being arraigned as an accused, a complaint against the petitioner is **not maintainable *Himanshu vs. B. Shivamurthy & Anr. (Supra)***.

23. CRR 53 of 2022 is allowed.

24. The proceedings in connection with Complaint Case No. 60C/2017 under Section 138 of the Negotiable Instruments Act, pending before the Court of the Learned Judicial Magistrate, 3rd Court, Malda and all orders passed therein in connection with the above mentioned complaint case, **is hereby quashed in respect of the petitioner.**

25. All connected applications, if any, stand disposed of.

26. Interim order, if any, stands vacated.

27. Copy of this order be sent to the learned Trial Court for necessary compliance.

- 28.** Urgent Photostat certified copy of this order, if applied for, be supplied to the parties, upon compliance with all requisite formalities.

(Shampa Dutt (Paul), J.)