



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION [APL] NO.374 OF 2023

Applicant : Mahim Services Station,
Through its Proprietor Tasleem Chougale,
Aged about 59 years,
Office at Lady Jamshedji Road,
Near Bank of Maharashtra, Mahim- West, Mumbai.
– Versus –

Non-Applicant : Abhishek Residential Project Pvt. Ltd.,
Having registered Office at
M001, Mezzanine Floor, Shrika Corporate,
Behind Gulmohar Hall, Pandey Layout, Khamla,
Nagpur, Maharashtra,
through Its Director Abhishek Dadhe,
Aged about 33 years, Occ : Business,
R/o. Flat No.202, Swami Apartment,
Behind Lokmat Building, Ramdaspath, Nagpur.

Mr. Hafeezur Rehman a/w Mr. P.S. Tiwari, Advocate for the Applicant.
Mr. A.S. Dhore, Advocate for the Non-Applicant.

CORAM : **M.W. CHANDWANI, J.**
DATE : **27th FEBRUARY, 2024.**

ORAL JUDGMENT :

Heard.

02] The application invokes inherent jurisdiction of this Court under
Section 482 of the Code of Criminal Procedure ('Cr.P.C.' for short) and seeks
quashing of Summary Criminal Complaint No.12900 of 2022 pending on the file
of the learned Judicial Magistrate First Class (Special Court), Nagpur.

03] The facts, which lead to filing of the present application can be culled out as under:

The non-applicant, a private limited company engaged in the construction and development of the residential projects, filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "N.I. Act" for short) against the applicant alleging that the applicant is a proprietary concern and it took financial help from the non-applicant. In discharge of its legal liability, the applicant issued three cheques in favour of the non-applicant for Rs.7.00 lakhs, Rs.10.00 lakhs and Rs.10.00 lakhs dated 01/04/2022, 09/04/2022 and 11/04/2022, respectively. When the said cheques were presented for encashment, they were dishonored. Despite issuance of statutory notice under Section 138 of the N.I. Act, the applicant failed to pay the cheque amount. The learned Additional Chief Judicial Magistrate (Special Court), Nagpur, issued process against the applicant for the offence punishable under Section 138 of the N.I. Act. Feeling aggrieved with the issuance of process against the applicant, the present application under Section 482 of the Code of Criminal Procedure (Cr.P.C.) came to be filed mainly on two grounds, firstly, non-indorsement of part payment on the cheques and secondly, not holding the mandatory inquiry under Section 202 of Cr.P.C.

04] Mr. Hafeezur Rehman, learned Counsel appearing on behalf of the applicant vehemently submitted that the non-applicant in its complaint claimed that an amount of Rs.22.00 lakhs was outstanding towards the applicant (referred to paragraph 5 of the complaint). As per the allegations of the complaint itself, the non-applicant has admitted the part payment of Rs.5.00 lakhs out of Rs.27.00 lakhs. Since, the applicant had paid of Rs.5.00 lakhs, part of the cheque amount, the non-applicant ought to have indorse this payment on the cheque. But, instead of making an indorsement to that effect on the instrument, the non-applicant has tendered the said cheques with its banker for encashment of Rs.27.00 lakhs. According to him, Section 56 of the N.I. Act mandates an indorsement on the instrument regarding part payment of amount mentioned in the instrument. Consequences of making such indorsement would be that when the cheque will be presented, it would be honoured only for the balance amount. In case a cheque is dishonoured for balance amount, then only the drawee of the cheque can take recourse to the provisions of Section 138 of the N.I. Act. Since no such indorsement has been made on the instrument by the non-applicant, the offence punishable under Section 138 of the N.I. Act would not attract. Consequently, the complaint filed by the non-applicant for dishonour of the cheques amounting to Rs.27.00 lakhs would not be maintainable against the applicant.

05] To buttress his submission, the learned Counsel for the applicant seeks to rely on the decision of the Supreme Court in the case of **Dashrathbhai Trikambhai Patel vs. Hitesh Mahendrabhai Patel and another**¹, wherein the Supreme Court in paragraph 33 has observed as under :

“Under Section 56 read with Section 15 of the Act, an endorsement may be made by recording the part-payment of the debt in the cheque or in a note appended to the cheque. When such an endorsement is made, the instrument could still be used to negotiate the balance amount. If the endorsed cheque when presented for encashment of the balance amount is dishonoured, then the drawee can take recourse to the provisions of Section 138. Thus, when a part- payment of the debt is made after the cheque was drawn but before the cheque is encashed, such payment must be endorsed on the cheque under Section 56 of the Act. The cheque cannot be presented for encashment without recording the part payment. If the unendorsed cheque is dishonoured on presentation, the offence under Section 138 would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment.”

The Supreme Court in paragraph 34 summarized its findings, which are reproduced below:

“34.1. For the commission of an offence under Section 138, the cheque that is dishonoured must represent a legally enforceable debt on the date of maturity or presentation.

1 (2023) 1 SCC 578

34.2. *If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque.*

34.3. *When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the cheque as prescribed in Section 56 of the Act. The cheque endorsed with the payment made may be used to negotiate the balance, if any. If the cheque that is endorsed is dishonoured when it is sought to be encashed upon maturity, then the offence under Section 138 will stand attracted.*

34.4. *The first respondent has made part-payments after the debt was incurred and before the cheque was encashed upon maturity. The sum of rupees twenty lakhs represented on the cheque was not the 'legally enforceable debt' on the date of maturity. Thus, the first respondent cannot be deemed to have committed an offence under Section 138 of the Act when the cheque was dishonoured for insufficient funds.*

34.5. *The notice demanding the payment of the 'said amount of money' has been interpreted by judgments of this Court to mean the cheque amount. The conditions stipulated in the provisos to Section 138 need to be fulfilled in addition to the ingredients in the substantive part of Section 138. Since in this case, the first respondent has not committed an offence under Section 138, the validity of the form of the notice need not be decided."*

06] Next, the learned Counsel for the applicant submits that the Special Court did not follow the mandatory requirement of holding inquiry mentioned

in Section 202 of Cr.P.C., which speaks for conducting inquiry before issuance of process, in a case where the accused resides beyond the area of territorial jurisdiction of the Magistrate. The applicant is residing at Mumbai, which is outside the territorial jurisdiction of Nagpur city. Therefore, it was mandatory for the learned Magistrate to send the matter to Police Station for inquiry under Section 202 of Cr.P.C.. The Special Court did not follow the said provisions and straightway issued the process against the applicant, which is against the law. He vehemently submits that on this ground also, issuance of process by the Special Court is vitiated and the proceedings are required to be quashed.

07] The sum and substance of the argument of the learned Counsel for the applicant is that issuance of process against the applicant is bad in law, therefore, the complaint against the applicant is not sustainable and, therefore, it is liable to be quashed.

08] Referring to the decisions of the Supreme Court in the case of **Dhariwal Tobacco Products Limited and others vs. State of Maharashtra and another**² as well as **Prabhu Chawla vs. State of Rajasthan and another**³, the learned Counsel for the applicant submitted that the application under Section 482 of Cr.P.C. against issuance of process by the learned Magistrate is maintainable without availing the remedy of revision before the learned Additional Sessions Judge. According to him, the objection raised by the non-

2 (2009) 2 SCC 370

3 (2016) 16 SCC 30

applicant about maintainability of application under Section 482 of Cr.P.C. is not sustainable and deserves to be overruled.

09] *Per contra*, the learned Counsel appearing on behalf of the non-applicant submitted that he does not dispute that the High Court can entertain the application under Section 482 of Cr.P.C. regardless of the fact, whether the applicant has availed the remedy of revision before the learned Additional Session Court. According to him, judicial propriety demands that the applicant ought to have availed the remedy of revision under Section 397 of Cr.P.C. before the learned Additional Sessions Judge. Arguing on merits, the learned Counsel for the non-applicant submits that while considering the quashing of proceedings, the allegations levelled in the complaint and the material, which was before the learned Magistrate while issuing process is to be considered. The defence of the accused cannot be looked into while considering the legality of issuance of process by the learned Magistrate. The only exception to this rule is that uncontroverted or unimpeachable material relied upon by the defence can be considered. Taking this argument further, the learned Counsel for the non-applicant took me to the allegations made in the complaint. According to him, there are specific allegations in the complaint that after payment of Rs.5.00 lakhs made by the applicant, still an amount of Rs.27.00 lakhs was outstanding and due to the applicant. Towards discharge of the said liability, the cheques for Rs.27.00 lakhs were issued. The Special Court has

rightly issued the process against the applicant considering the material before it.

10] Lastly, the learned Counsel for the non-applicant submitted that perusal of the order impugned reveals that the Special Court has taken care of mandatory provision contained in Section 202 of Cr.P.C. Relying on the decision of the Supreme Court in **Suo Motu Writ Petition (Cri.) No.2 of 2020⁴**, the learned Magistrate has recorded its satisfaction that the case is based on the documents, therefore, instead of examining the other witnesses, he found sufficient material to issue the process against the applicant. Therefore, on this ground also, the applicant has no case.

11] The law with regard to maintainability of the application under section 482 of Cr.P.C. without availing remedy of revision before the Sessions Court has been dealt by the Supreme Court in its decision in case of **Dhariwal Tobacco Products Limited** and later in decision of the **Full Bench** in **Prabhu Chawla**, after discussing at length, the Supreme Court has opined that there can be no complete ban on the exercise of inherent powers of the High Court. Since Section 397 Cr.P.C. is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 of Cr.P.C. only to petty interlocutory orders. A situation wholly unwarranted and undesirable.

4 (2021) 16 SCC 116

12] Going by the merits of the application, there is no dispute about the proposition of law that while considering quashing of proceedings/issuance of process, the allegations made in the complaint and documents annexed with the complaint only are to be considered. Disputed facts cannot be considered at the time of quashing the proceedings, except, where the material produced by the defence is of unimpeachable quality, so as to altogether disprove the allegations made in the complaint.

13] This takes me to the relevant allegations made in the complaint. Paragraphs 5 and 6 of the complaint, in question, are reproduced here.

“5. That the accused have paid the interest amount regularly till 2016 and also pay Rs.5,00,000/- on 11/04/2016 out of principal amount i.e. Rs.27,00,000/-.

6. Thereafter, the accused have paid the interest regularly on the balance principal amount of Rs.22,00,000/- from May, 2016 till December, 2019, however, failed to pay interest from January, 2020 till March, 2022 quoting the reason of financial difficulty, the accused kept on extending the time posing further financial crunches. Considering friendly relations, the complainant agreed for the same initially and for considerably a long period of time. Lastly, the accused had settled the accounts and further promised to repay the amount of Rs.27,00,000/- towards final settlement in the month of March, 2022, but to no avail.”

14] Though the complainant/non-applicant has admitted in paragraph 5 of the complaint that out of Rs.27.00 lakhs, an amount of Rs.5.00 lakhs was

paid by the applicant to the non-applicant, paragraph 6 of the complaint depicts that the applicant failed to pay the interest from January 2020 till March, 2022 on the outstanding balance of Rs.22.00 lakhs. It further reveals that in the month of March, 2022, the applicant had settled the accounts and promised to repay the amount of Rs.27.00 lakhs towards final settlement. The complaint further speaks about issuance of the three cheques for Rs.27.00 lakhs, which according to the non-applicant, dishonoured when those were presented for encashment with its banker. Thus, from the allegations made in the complaint, it does not reveal that after issuance of the cheques for total amount of Rs. 27.00 lakhs, part payment was made, and only an amount of Rs.22.00 lakhs was outstanding. Therefore, the question of invoking Section 56 of the N.I. Act, at this stage, cannot arise. Consequently, the ratio laid down in the case of **Dashrathbhai Patel** (*supra*) will not be of any assistance to the applicant.

15] Turning to the submission of the learned Counsel for the applicant regarding mandatory inquiry under Section 202 of Cr.P.C. No doubt, in a case where the accused is residing at place beyond the area in which the magistrate exercises his jurisdiction, Section 202 of Cr.P.C. mandates inquiry either by magistrate himself or investigation by the police. In an inquiry, the magistrate may, if he thinks fit, take evidence of the witnesses on oath.

16] A reference may be made to the decision of the Supreme Court in case of Vijay Dhanuka and others vs. Najima Mamtaj and others⁵, in paragraph 12, which reads thus :

“The use of the expression “shall” prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word “shall” is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word “shall” in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression “shall” and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.”

17] In a later decision of Constitution Bench of the Apex Court pertaining to the expeditious trial of cases under Section 138 of the N.I. Act in Suo Motu Writ Petition (Cri.) No.2 of 2020, the Supreme Court, while considering the scope of Inquiry under Section 202 of Cr.P.C., has observed in paragraph 12, which is reproduced here.

5 (2014) 14 SCC 638

“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."

18] Thus, in view of the law enunciated in the aforesaid case, in a complaint filed for the offence punishable under Section 138 of the N.I. Act, while conducting inquiry by himself, in suitable cases, the Magistrate may not examine the witnesses including the complainant. He may rely on the affidavits filed by the complainant and on examination of documents may get satisfied as to the sufficiency of grounds for proceeding under Section 202 of Cr.P.C. The satisfaction of the Magistrate shall be reflected from the order.

19] Needless to mention, the present complaint is filed for the offence punishable under Section 138 of N.I. Act. While issuing the process, the learned Magistrate has pass following order:

ORDER

1. *Issue process against the accused vide Section 204 of the Code of Criminal Procedure for the offence punishable under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881, through RPAD/Regular mode, returnable 15/12/2022.*
2. *Accused is at liberty to make an application for compounding of the offence at the first or second hearing of the case and if such application is made compounding of offence would be considered without any costs and if such application is not*

made the compounding of offence shall be subject to costs as per the guidelines of the Supreme Court.

- 3. Also the summons be sent by speed post for speedy service as per Section 144 of the N.I. Act, 1881. Hamdast is granted.*
- 4. The complainant is directed to supply a copy of complaint along with all necessary documents to the accused."*

20] The learned Magistrate chose to conduct inquiry by himself. The case is totally dependent on documents, as rightly held by the Special Court, particularly on the cheque, memo of bank and issuance of notice. It reflects from the order that after perusing of the affidavit of the complainant and the documents, the learned Magistrate got himself satisfied about the sufficiency of grounds and issued process for the offence punishable under Section 138 of N.I. Act. I do not find any illegality in the order of the learned Magistrate that dispenses with the examination of witnesses.

21] Therefore, the application is sans merit and stands dismissed.

(M.W. CHANDWANI, J.)