
(2013) 11 DEL CK 0312

In the Delhi High Court

Case No : Crl. M.C. 2698 of 2011, Crl. M.A. Nos. 9619 of 2011 and 1468 of 2013

Ambica Plastopack Pvt. Ltd.

APPELLANT

Vs

State of Delhi

RESPONDENT

Date of Decision : 01-11-2013

Acts Referred:

Citation : (2014) ALLMR(Cri) 177

Hon'ble Judges : J.R. Midha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

J.R. Midha, J.—The petitioners have challenged the summoning order dated 24th February, 2011 passed by the learned Metropolitan Magistrate in a complaint u/s 138 of the Negotiable Instruments Act. Vide ex parte order dated 17th August, 2011, the notice of this petition was issued to the respondents and the proceedings before the learned Metropolitan Magistrate were stayed. The interim order is continuing till date and the proceedings before the learned Metropolitan Magistrate are stayed for last more than two years.

2. The brief relevant facts relating to this case are as under:-

(i) Respondent No. 2 was supplied printing ink/adhesive to the petitioners in terms of the orders placed from time to time. The petitioners issued four cheques bearing Nos. 743797 dated 27th September 2010, 743780 dated 24th September, 2010, 744724 dated 28th September, 2010 and 743798 dated September 25th September, 2010 for Rs. 10 lacs each drawn on Bank of Baroda, Faridabad to respondent No. 2 in part discharge of the above liability.

(ii) Respondent No. 2 presented the above mentioned four cheques to Bank of Baroda, Mayur Vihar, Phase-I. However, all four cheques were returned as unpaid for reason account closed whereupon respondent No. 2 issued a legal notice dated 25th October, 2010 to the petitioners.

(iii) On 10th December, 2010, respondent No. 2 instituted a complaint u/s 138 of the Negotiable Instruments Act before the learned Chief Metropolitan Magistrate, Karkardooma Courts relating to dishonour of aforesaid four cheques for Rs. 10 lacs each.

(iv) The learned Metropolitan Magistrate took on record the pre-summoning evidence of the complainant by way of affidavit on 24th February, 2011. Mr. B.K. Gupta, power of attorney holder of respondent No. 2 deposed in the evidence by way of affidavit that the petitioner handed over four cheques, Exs.PW-1/1 to P W-1/4 for Rs. 10 lacs each to respondent No. 2 in part discharge of legal liability of supply of goods vis-a-vis print ink/adhesive to respondent No. 2 and all the said four cheques were dishonoured upon presentation for the reason "account closed" by return memos Exs.PW-1/5 to PW-1/11. Respondent No. 2 proved a legal notice dated 25th October, 2010 as Ex.PW-1/12. The postal receipts were proved as Exs.PW-1/13 and PW-1/14. The acknowledgement card was proved as Ex.PW-1/15 and the refusal report of petitioner No. 2 was proved as Ex.PW-1/16.

(v) The learned Metropolitan Magistrate issued the summons to the petitioners after examining the pre-summoning evidence and satisfying itself that prima facie offence has been made out against the petitioners. The summoning order dated 24th February, 2011 is reproduced hereunder:

Pre summoning evidence tendered by way of affidavit. Complainant has also filed affidavit stating that no other complaint is pending between the parties in any other court in respect of the same transaction. Additional affidavit by way of evidence filed on behalf of complainant. Same be taken on record. No other complainant witness is present. Pre summoning evidence closed. Arguments on summoning heard.

I have gone through the record carefully. There are allegations in the complaint that accused has issued cheque to the complainant to discharge his liability. On its presentation, the same had been dishonoured. Thereafter, demand notice has been served upon the accused through registered AD/courier. Despite service of notice, accused has failed to make the payment as per provisions of Negotiable Instruments Act. Complaint is within limitation period. In my considered opinion, prima facie there is sufficient material available on record to summon the accused. Hence, accused be summoned for offence u/s 138 of Negotiable Instruments Act on filing of PF, speed post/authorized courier returnable on 23.07.2011. At request, dasti be given.

3. The petitioners have challenged the summoning order on four grounds.

Territorial Jurisdiction

4. First ground of challenge is that the Delhi Court does not have the territorial jurisdiction as the cheques in question were drawn at Bank of Baroda, Faridabad. However, the learned counsel for the petitioner did not press this ground at the time of hearing in view of the recent judgment of the Supreme Court in Nishant

Aggarwal Vs. Kailash Kumar Sharma, .

Inquiry u/s 202 Cr.P.C.

5. Second ground of challenge is that the learned Metropolitan Magistrate has not conducted any inquiry or investigation in terms of Section 202 Cr.P.C. There is no merit whatsoever in this ground as the learned Metropolitan Magistrate took into consideration the evidence by way of affidavit of the complainant and the documentary evidence on the basis of which prima facie case was made out against the petitioners and no further enquiry was warranted in the matter. This case is squarely covered by *Abhishek Agrawalla Vs. Boortmalt NV and Another*, , in which this Court held as under:

3. The only ground pressed during arguments of this petition assailing order of learned MM is that the order was bad in law in view of the fact that the trial court failed to comply with the provisions of Section 202 Cr.P.C whereunder the trial court was supposed to postpone the issue of process and was to conduct an inquiry either himself or direct investigation to be made by the police officials into the allegations since the accused was residing at a place beyond the area in which the trial court had jurisdiction.

4. It is submitted by the counsel for the petitioner that recording of complainant s evidence on oath and evidence of witnesses was required to be done by the Magistrate u/s 200 Cr.P.C. and the Magistrate after recording complainant s evidence can issue process in respect of accused person living within the jurisdiction. However, if the accused was living beyond the jurisdiction of the court i.e. accused was not living within Delhi, then in view of Section 202 Cr.P.C. mere recording of complainant s evidence and witnesses was not sufficient and an inquiry was required to be conducted mandatorily under the provisions of Section 202 Cr.P.C. before issuing process.

xxx xxx xxx

8. There are two kinds of cases which come before the court, one where the offence is sought to be proved from documents and the oral testimony is given before the court to prove the documents by exhibiting the documents and by deposing as to when the documents were executed and by whom. The other kind of cases are where the case does not depend on documentary evidence and depends upon only the oral testimony. These are cases of physical hurt, injuries, threats etc. In order to protect an innocent person being summoned by the Magistrate on the basis of oral testimony of a person and considering that a large number of false complaints were being filed at far-off places just to harass the people, the Parliament had amended Section 202 so that the summoning orders were not issued mechanically by the Magistrates and whenever the accused was of other State an investigation or enquiry into the allegations was mandatorily conducted either by the Magistrate himself or through police. Say for example, a person files a complaint that on telephone he had been threatened by a person seeking ransom or he had been threatened to be killed and the person who

allegedly threatened him was living outside the jurisdiction of the court. Before acting on this oral statement of the victim, it would be incumbent upon the court to make an enquiry about the call details, about the telephone and about telephone number from which the threat was allegedly received and the telephone number of the complainant. The call details for period around the date of incident would show if the calls had been made frequently or it was a solitary call and the Magistrate can also make enquiry about the person in whose name the telephone was standing. This would enable the Magistrate to find out if there was credibility in the statement given by the complainant. The Magistrate can summon the officials of service provider telephone company and make this enquiry himself. Similarly there may be a case where a person alleges that while he was at X place, Y a resident of other State had come there and beaten him or abused him or threatened him or caused injuries to him etc. The person produces his MLC and makes an oral statement. The court in such a case, if the accused is of outside his jurisdictional area, would have to get an enquiry made through police if the accused was living at the address given and if the accused had visited the place where it was alleged that he had beaten or threatened. The Magistrate can also get a fact finding enquiry done from police of that State or police of his own State. However, where the commission of offence is disclosed only from the documents, no further enquiry except scrutinizing the documents proved before the court by testimony of complainant is feasible, I consider that the enquiry envisaged u/s 202 Cr.P.C. in such cases is an enquiry by way of recording statement of complainant and careful scrutiny of documents relied upon by the complainant. Say, if a case against the accused is filed u/s 138 of Negotiable Instruments Act and the accused lives in Noida while the complainant lives in Delhi. The Magistrate in such a case has only to consider if prima facie offence was committed or not and if it has jurisdiction based on the documents i.e. whether the cheque was dishonoured, whether the proper demand notice was sent and still payment was not made etc. Similarly there are several statutes where the offence is of technical nature and the commission of offence can be made out from the documents, say the offences under the Companies Act, against the directors of the company for violating the mandatory provisions regarding filing of returns etc. The company may be registered in Delhi but the director may be living in Noida or Gurgaon. In such a case, the commission of offence has to be inferred only from the documents and the enquiry u/s 202 Cr.P.C. has to be limited to scrutiny of the documents and recording of statement of the complainant and cannot go beyond that.

9. What is the import of provisions of Section 202 Cr.P.C. can be seen from the decision of the Supreme Court in *Rosy and Another Vs. State of Kerala and Others*, . In this case another provisions of sub Section 202, which is also couched in mandatory language had come into question i.e. Section 202(2) proviso. This proviso provides that where the offence was triable by the court of Sessions, the Magistrate shall call upon the complainant to produce all his witnesses and examine them on oath. The proviso is couched in mandatory

words and the mandate is "He shall call upon the complainant to produce all his witnesses and examine them on oath". The Supreme Court in this case observed that the issue of complying with proviso to Sub Section 2 of Section 202 Cr.P.C. would arise only in cases where the Magistrate before taking cognizance of the case, decides to hold enquiry and after enquiry if he decides to take the evidence of witnesses on oath. The object and purpose of holding an enquiry or investigation u/s 202 Cr.P.C. is to find out whether there was sufficient ground for proceeding against the accused or not and that holding enquiry or investigation is not an mandatory course before issue of process against the accused or dismissal of the complaint. It is an enabling provision to form an opinion as to whether or not process should be issued and to remove from his mind any hesitation that he may have fallen upon on mere perusal of the complaint and consideration of complainant s evidence on oath.

10. The Supreme Court further observed that the enquiry u/s 202 is of a limited nature. Firstly it is to find out whether there was a prima facie case against a person accused of the offence in the complaint and secondly to prevent the issuance of process in all such complaints that are false or intended only to harass a person. In *Kewal Krishan v Suraj Bhan* 1980 Supp. SCC 499, the Supreme Court observed that what the Magistrate has to do is to see whether on a cursory perusal of the complaint of the complaint and the evidence recorded under preliminary enquiry u/s 200 and 202 Cr.P.C. there is prima facie evidence in support of the charges leveled against the accused. About use of the word shall in the proviso to sub section 2, the Supreme Court made following observations:

17. At initial stage, if objection is raised and it is found by the Sessions Court that by non-holding of inquiry, prejudice is caused to the accused, he may direct the Magistrate to follow the procedure prescribed under the proviso. It is no doubt true that by the use of the words "shall", it appears that language used in the proviso is of mandatory nature. At the same time, it is a procedural law and it is to be read in context of Section 200 which enables the Magistrate to issue process without holding any inquiry and that inquiry u/s 202 is itself discretionary one giving option to examine or not to examine witnesses. Hence, proviso to the said subsection is required to be read accordingly though couched in mandatory term by using the word "shall". Normally, the procedure prescribed therein should be followed, but non-observance of the said procedure may not vitiate further proceedings in all cases. In a case where a complaint is filed, not by the public servant, and where the offence is exclusively triable by the court of Session the Magistrate should follow the proviso to sub-section (2) of Section 202 and call upon the complainant to produce all his witnesses and examine them on oath. This would be in consonance with the provision of Section 208 which inter alia provides for supply of copy of statements and documents to accused. This would also facilitate the Sessions Court in framing the charge or discharging the accused. In the Sessions triable case, u/s 226 the prosecution has to open its case by describing the charge brought against the accused and

stating by what evidence it proposes to prove the guilt of the accused. On such submission, the Sessions Court is required to consider the record of the case and the documents submitted therewith and after hearing the submissions of the accused and prosecution in this behalf, to decide whether there is sufficient ground or not for proceeding against the accused. Upon such consideration, if the court finds that there is no sufficient ground for proceeding against the accused, he shall be discharged as provided under s. 227. In case, where there is sufficient ground, court is required to frame the charge as provided under s. 228. Hence, for the purpose of framing the charge also the recording of such evidence is necessary. It also facilitates the accused to know allegation made against him as well as evidence in support thereof. However, in a case where complaint is filed by a public servant after holding inquiry and recording the statements, question of recording of such evidence may not arise. Hence, compliance of proviso by the Magistrate in all Sessions triable cases is not a must and would not vitiate the further trial unless prejudice caused to the accused is established.

11. I, therefore, consider that in the present case where disclosure of commission of offence was based on documentary evidence produced by the complainant before the court and from the documents it was prima facie clear that a commission of offence u/s 420 IPC has taken place, no further enquiry could have been held by the Magistrate.

xxx xxx xxx

13. In *Rosy v State* (supra) the Supreme Court also agreed with the submission of counsel for the appellant that the provisions u/s 465 Cr.P.C. would play a role at any stage and observed as under:

18. Further, the aforesaid interpretation would be in consonance with Chapter XXXV of the Cr.P.C., which deals with irregularities in the proceedings, which may or may not vitiate the proceedings. Sections 460 and 461 provide which irregularities would or would not vitiate the proceedings. In these sections, there is no mention of Section 202, For our purpose reference to Section 465 would suffice, which inter alia specifically provides that irregularity in the complaint, summons, warrant, order or other proceedings before or during trial or in any inquiry shall not be a ground for reversing order passed by the competent Court, unless in the opinion of that Court a failure of justice has in fact been occasioned thereby. Sub-section (2) further provides that in determining whether any irregularity in proceeding has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. Hence, the statute does not expressly provide for nullification of the order as a consequence of noncompliance of proviso to sub-section (2) of Section 202, but provides that unless prejudice is caused, the order is not to be set aside. This would mean that during inquiry u/s 202 when Magistrate examines the witnesses on oath, as far as possible the proviso is to be complied with but the mandate is not absolute.

14. I consider that the learned MM rightly issued summon as against the petitioner/accused in this case and no further enquiry apart from the enquiry already held by way of examination of witnesses of complainant and examined documents was feasible in this case. The enquiry or investigation u/s 202 Cr.P.C. has to be done in all those cases where the case is based only on oral evidence and accused lives beyond jurisdiction of court verification about presence of accused or about such other factors like use of telephone etc is involved and the Magistrate in all such cases mandatorily hold an enquiry either himself or through police.

Cheques given as Security

6. The third ground of challenge is that the cheques in question were given as security and not in discharge of any legal liability. Since the defence of the petitioners was not before the learned Metropolitan Magistrate at the time of issuing of summons, the learned Metropolitan Magistrate had no occasion to look into the same at the time of issuing of summons. There is a legal presumption u/s 139 of the Negotiable Instruments Act that the cheques in question have been issued in discharge of a debt or liability unless rebutted by the petitioners. The petitioner have to rebut the presumption u/s 139 before the learned Metropolitan Magistrate at an appropriate stage. Section 482 Cr.P.C. cannot be invoked by the petitioner to rebut the legal presumption. Reference may be made to *Hiten P. Dalal Vs. Bratindranath Banerjee*, *M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another*, and *Maruti Udyog Ltd. Vs. Narender and Others*, .

More than three Cheques clubbed in a Complaint u/s 138 Negotiable Instruments Act

7. The last ground of challenge by the petitioners is that more than three cheques cannot be clubbed in proceedings u/s 138 of Negotiable Instruments Act. There is no merit in this contention as the cause of action for filing a complaint u/s 138 of the Negotiable Instruments Act is the service of notice u/s 138 of the Negotiable Instruments Act and not the dishonour of cheques. In the present case, the complainant issued one notice of dishonour, Ex.PW1/12, in respect of four dishonoured cheques issued by the petitioner and therefore, Section 219 Cr.P.C. would not be applicable. This case is squarely covered by the following judgments:-

7.1 In *Tiruchandoor Muruhan Spinning Mills (Private) Limited and Others Vs. Madanlal Ramkumar Cotton and General Merchants*, : , the Karnataka High Court held that the cause of action for filing a complaint u/s 138 of the Negotiable Instruments Act is the service of notice contemplated u/s 138(b) of the Negotiable Instruments Act and not the dishonour of cheques. Where one single notice of dishonour is issued in respect of number of dishonoured cheques, Section 219 Cr.P.C. would not be applicable. It was further held that filing of one complaint in such a case is to the advantage of the accused.

7.2 In *Rajendra B. Choudhari Vs. State of Maharashtra and Another*, , the Bombay High Court held that the dishonour of each cheque would constitute a separate cause of action if separate notices are issued in respect of each of the cheques. The payee is not prevented from combining the cause of action by covering all the instances in single notice. In such a case, all the transactions covered by the notice would be regarded as a single transaction, permitting a single trial. However, Section 219 Cr.P.C. would be attracted only if separate notices are issued in respect of each cheque.

7.3 In *Popular Dyes and Chemicals (Pvt.) Ltd. and others Vs. Aiyawarya Chemicals (No. 2)*, , the Madras High Court held that Section 219 Cr.P.C. relates to joinder of charges. It is only at the stage of framing of charges that Section 219 Cr.P.C. has to be considered. The Court further held that the inclusion of four dishonoured cheques in one complaint cannot be a ground to quash the same by invoking inherent jurisdiction u/s 482 Cr.P.C. as the very object of Section 219 is to prevent miscarriage of justice by clubbing together a number of offences and making it impossible for the accused to defend them. The Court further held that quashing of the complaint for the reason urged by the petitioners would only lead to abuse of process of Court. The Court therefore, dismissed the petition.

7.4 In *Manjula Vs. Colgate Palmolive (India) Limited*, , the Division Bench of Madras High Court, after referring to several judgments of various High Courts held that dishonour of sixteen cheques drawn on different dates when presented together for payment and the issuance of a single lawyer's notice demanding payment of the amount towards all the dishonoured cheques be covered by Section 220(1) Cr.P.C. and hence is saved from the mischief of Section 219 Cr.P.C. The relevant portion of the said judgment is reproduced hereunder:-

12. The abovesaid 16 cheques were drawn on different dates and they were for different amounts, but, they were presented together for payment and were dishonoured and a single notice was sent by the complainant to the drawer. The general rule is that every distinct offence of which a person is accused, there shall be separate charge and every such charge shall be tried separately. As observed by the Division Bench of the Kerala High Court in 1996 (3) Cri 283, Section 219 Cr.P.C. is an exception to the general rule. As stated earlier, even though different cheques were given on different dates, the presentation of all those cheques formed the same transaction. Further, the demand was also made by the complainant on the dishonouring of the cheques by giving one lawyer's notice and not several demands for the payment of the dishonoured cheques. In those circumstances, we are of the view that the petitioner/accused herein may be charged and tried at one trial for several such offences, because, the series of acts are so inter-linked or inter-connected.

13. The very object of Section 219 is to prevent miscarriage of justice by clubbing together a number of offences and making it impossible for the accused to defend them. Sections 219 and 220 Cr.P.C. lay down different and distinct exception to the general rule contemplated u/s 218 Cr.P.C. in framing charges.

We are of the view that the number of three offences underlined in Section 219 of the Code cannot control Section 220(1) of the Code.

14. In the instant case, the offences committed by the same person in respect of 16 cheques must certainly be held to be part of the same transaction considering the purpose, the sequence, events, nature of the allegation, proximity of commission, unity of action etc. In such circumstances, it is easy to conclude that the offences u/s 138 of the Act in respect of those cheques can be held to be offences committed in the course of same transaction. Section 219(1) Cr.P.C. refers to identical offences committed on different dates during a span of 12 months. It permits joinder of those charges provided they are offences of the same kind.

15. In these circumstances, we hold that Section 219(1) Cr.P.C. permits joinder of all charges provided they are offences of the same kind. We are also of the view that the number of transactions and the cheques issued prior to the issuance of the statutory notice u/s 138(b) of the Act could at best be considered as bundle of facts giving rise to a cause of action and that it is not a ground to quash the criminal proceedings against the drawer of the cheques. We further hold that if the offences are of the same kind, the number of transactions between the parties which culminated into issuance of the statutory notice is no ground to urge that u/s 219 Cr.P.C., the prosecution laid against the petitioner is not maintainable.

16. In the case on hand, though the act of issuance of 16 cheques was on different dates, in view of the fact that a demand was made by issuing a common notice, the complaint cannot be said to be vitiated. To put it clear, though the giving of cheques by the accused to the complainant may be on different dates, all those acts of giving those cheques were merged together to form the same transaction viz., the presentation of the cheques together was on one particular date. In view of the fact that demand was also made by the complainant on the dishonouring of the cheques by giving one lawyer's notice and not several demands, we are of the view that the accused may be charged and tried at one trial for several such offences because the series of acts are so inter-linked or inter-connected together so as to form the same transaction of dishonouring the cheques, therefore, it cannot be said that the complaint is vitiated.

8. Same view has also been taken by this Court in *Sharma Contracts (India) Pvt. Ltd. Vs. State and Another* which may also be referred to.

This petition is gross abuse and misuse of process of law

9. In *Rajesh Agarwal Vs. State and Another*, this Court noted that the High Court is flooded with petitions u/s 482 Cr.P.C. for challenging the summoning order passed by the Magistrate u/s 138 of the Negotiable Instruments Act. This Court further noted that the accused rush to the High Court on mere passing of summoning order and are successful in halting the proceedings before the

Magistrate on one or the other ground while the kind of defence raised by the petitioners is required to be raised before the Magistrate at the very initial stage as per the law. The object of the proceedings u/s 138 of the Negotiable Instruments Act is that the cheques should not be used by persons as a tool of dishonesty and 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 must face the criminal trial and consequences. However, the effort of some of the petitioners is to teach a lesson to complainant for approaching court of law. The amount of cheque is not paid despite demand notice and the complainant is made to suffer further by prolonging the litigation carrying it from one forum to other. In many cases, the petitioners do have genuine defence, but, due to mis-reading of the provisions of Negotiable Instruments Act and Cr.P.C., it is considered that the only option available is to approach the High Court and on this the High Court is made to step into the shoes of Metropolitan Magistrate and examine their defence first and exonerate them. This Court noted the reasons for delay in disposal of cases u/s 138 of the Negotiable Instruments Act and held that the accused cannot appear before the High Court without appearance and disclosure of defence before the Magistrate. This Court laid down the following principles relating to the proceedings u/s 138 of the Negotiable Instruments Act:-

1. Section 143 of the Negotiable Instrument Act:

Under Section 143 of the Negotiable Instrument Act, all offences are to be tried in accordance with summary trial provisions of Section 260 to 265 of Cr.P.C. In case of conviction of the accused u/s 138, the Magistrate can pass an order of imprisonment up to one year and fine not exceeding Rs. 5,000/-. However, if the Magistrate finds that the nature of the case warrants imprisonment exceeding year, the Magistrate shall, after hearing the parties, pass a reasoned order for hearing the case as a summons trial case and recall the witnesses who may have been examined.

2. Section 145 of the Negotiable Instrument Act:

2.1 Complainants evidence to be by way of affidavit

Under Section 145 of the Negotiable Instrument Act, the evidence of the complainant is to be given by way of affidavit which shall be read in evidence.

2.2 Cognizance of the offence to be taken on the basis of affidavit and documents

The affidavit and the documents filed by the complainant along with complaint for taking cognizance of the offence are good enough to be read in evidence at both the stages i.e. pre-summoning stage and the post summoning stage.

2.3 Complainant not required to examine himself twice

The complainant is not required to examine himself twice i.e. once after filing the complaint and second after summoning of the accused.

2.4 Complainant not required to be recalled unless a specific order of Magistrate u/s 145(2) of Negotiable Instruments Act

The complainant is not required to be recalled and re-examined after summoning of accused unless the Magistrate passes a specific order as to why the complainant is to be recalled. Such an order is to be passed on an application made by the accused or u/s 145(2) of N.I. Act suo moto by the Court.

3. Summary Procedure u/s 260 to 265 Cr.P.C.

3.1 In summary trial, after the accused is summoned, his plea is to be recorded u/s 263(g) of Cr.P.C. and his examination if any can be done by Magistrate and a finding can be given by the Court u/s 263(h) of his examination, The same procedure is to be followed by the Magistrates for offence of dishonour of cheque and if during the course of summary trial, it appears to the Magistrate that nature of case was such that it was desirable to try it as a summons trial, he has power to recall any witness who has been examined and proceed to re-hear the case in the manner provided in the Code.

3.2 Onus to prove that no offence is committed is on the accused. If proviso (a), (b) and (c) to Section 138 of N.I. Act are shown to have been complied with, technically the commission of offence stands completed. It is for the accused to show that no offence could have been deemed to be committed by him for some specific reasons and defences. He cannot simply say "I am innocent" or "I plead not guilty".

4. Procedure Prescribed Under Law:

4.1 Cognizance of offence upon examination of complaint, affidavit and documents

The procedure as prescribed under law is that along with complaint u/s 138 of N.I. Act. the complainant should file affidavit of his evidence and all necessary documents like dishonour memo, returned cheque, notice of demand and then learned Magistrate should scrutinize the complaint and documents and if he finds that the affidavit and the documents disclose dishonour of cheque issued by the accused, issuance of a demand notice by the complainant, non-payment of the cheque amount by the accused despite notice, cheque return-memo of the bank etc. and the complaint was filed within the period of limitation, cognizance is to be taken and notice of appearance of accused should be sent to the accused.

4.2 Accused must disclose his defence on the first date of hearing

4.2.1 In case the accused appears before the court of Magistrate, the Court should ask him as to what was his plea of defence. Normally, the first date is wasted by the courts of Magistrate just by taking bail bond of the accused and passing a bail order, while Sections 251 and 263(g) of Cr.P.C. provide that when the accused appears before Magistrate in a summary trial proceedings, the particulars of the offence, to which he is accused, shall be stated to him and he

should be asked whether he pleads guilty or he has any defence to make. This is the mandate of Section 143 of N.I. Act, which provides summary trial of offence in terms of Cr.P.C.

4.2.2 u/s 263(g) of Cr.P.C., the court has to record the plea of the accused and his examination. It is thus obvious that in a trial of an offence u/s 138 of N.I. Act, the accused cannot simplicitor say "I plead not guilty" and wants to face trial.

4.2.3 Since offence u/s 138 of N.I. Act is a document based technical offence, deemed to have been committed because of dishonour of cheque issued by the accused or his company or his firm, the accused must disclose to the Court as to what is his defence on the very first hearing when the accused appears before the Court.

4.3 Accused cannot appear before High Court without appearance and disclosure of defence before the Magistrate

4.3.1 If the accused does not appear before the Court of Magistrate on summoning and rather approaches High Court, the High Court has to refuse to entertain him and ask him to appear before the Court of Magistrate as the High Court cannot usurp the powers of Magistrate and entertain a plea of accused why he should not be tried u/s 138.

4.3.2 The plea as to why he should not be tried u/s 138, is to be raised by the accused before the Court of Magistrate u/s 251 and u/s 263(g) of Cr.P.C. Along with his plea, he can file necessary documents and also make an application, if he is so advised, u/s 145(2) of N.I. Act to recall the complainant to cross-examine him on his plea of defence. However, only after disclosing his plea of defence he can make an application that the case should not be tried summarily but as a summons trial case. This application must disclose the defence of the accused and the reasons why he wants the case to be tried as a summons trial.

4.4 Onus to prove the defence is on the accused u/s 106 of the Evidence Act, 1872 and it is not violative of Article 21 of the Constitution

4.4.1 An argument is raised that the accused, under Article 21 of Constitution of India, has a right of silence in a criminal trial and therefore he cannot be forced to disclose his defence. This argument is misconceived in view of Section 106 of Indian Evidence Act. Since an offence u/s 138 of N.I. Act is technical in nature and defence which an accused can take are inbuilt, like the cheque was given without consideration, the accused was not Director at that time, accused was a sleeping partner or a sleeping Director, cheque was given as a security etc. etc., the onus of proving these defences is on the accused alone, in view of Section 106 of Evidence Act. Since the mandate of Legislature is trial of such cases in a summary manner, the evidence already given by the complainant by way of affidavit is sufficient proof of the offence and this evidence is not required to be given again in terms of Section 145(1) of N.I. Act and has to be read during the trial.

4.4.2 The witnesses i.e. the complainant or other witnesses can be recalled only when accused makes an application and this application must disclose the reason why accused wants to recall the witnesses and on what point witness is to be cross examined.

4.4.3 When it is within the special knowledge of the accused as to why he is not to face trial u/s 138 N.I. Act, he alone has to take the plea of defence and 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.

4.4.4 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.

4.4.5 The proper procedure to be followed by Magistrate is that soon after summoning, the accused must be asked to disclose his defence and his plea should be recorded.

4.4.6 Where an accused takes no defence and simply says "I am innocent", there is no reason for the Magistrate to recall the complainant or witnesses during summary trial and the evidence already given by the complainant has to be considered sufficient and the trial court can ask the accused to lead his evidence in defence on the plea of innocence as the evidence of the complainant is already there.

4.5 In a summary trial, a complainant or his witness cannot be recalled in the court for cross examination only for the sake of pleasure

4.5.1 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.

4.5.2 In most of the cases, the court of Magistrate may not feel necessary that a sentence of imprisonment of more than one year should be inflicted. Unless the court, for reasons to be given, considers that the punishment in a case should be more than one year, the court cannot deviate from the procedure of summary trial and cannot ask the accused to appear again and again and defeat the very purpose of summary trial. Section 143 and 145 of 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 affidavit 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.

4.6 Service of summons on the accused

4.6.1 u/s 144 of N.I. Act, service of accused can be effected through registered post/speed post or by courier service and if the accused refuses to receive the summons, he can be declared served and court can take coercive measures for entering appearance of the accused. Chapter VI of Cr.P.C., u/s 62, 63 and 64, provides how summons are to be served on accused persons by police. Section 65 thereof provides that if service cannot be effected in the manner as provided in Section 62, 63 or 64 of Cr.P.C, the serving officer shall affix one copy summon on some conspicuous part of his house or area in which the accused resides and the court after making such inquiries may declare that the summons have been duly served. Thus service by affixation is a valid mode of service under criminal law and wherever the accused is evading his service, the court of Magistrate should direct service through affixation as provided u/s 65 of Cr.P.C. and in case the accused does not appear the court is at liberty to take steps for coercive appearance.

4.6.2 An issue arises where there are many accused persons in a case and some of them are not appearing, should the court proceed against those who are appearing or should wait for the completion of service of all the accused? I consider that summary trial leaves no option to the court. The whole purpose of summary trial shall stand defeated if the court of Magistrate tells the accused persons, who have been served, to come to the court repeatedly till the other accused are served. The plea of the accused is to be recorded on the day of his appearance under the summary trial and if that accused gets his plea recorded, he is at liberty to lead evidence in support of his plea and the court cannot tell him to keep coming repeatedly either in person or through counsel due to non appearance of other accused persons. The court, in such a case, asks him to disclose his defence and to prove his defence. In case court feels that the case should not be tried summarily and all the accused persons must necessary be tried together, then alone the court should ask the accused to wait but if the accused/respondent has a valid defence to show that he need not face trial because of a specific defence and he was prepared to lead evidence to this effect, he should be directed to lead evidence in support of his plea.

4.7 Settlement by the accused

Along with the notice of appearance, in view of the judgment of Supreme Court in Damodar S. Prabhu Vs. Sayed Babalal H., , the court of Magistrate should also inform the accused that in case he wants to make the payment of the cheque amount, he should either in person or through his counsel or representative sent the cheque amount, either in cash or through draft so that the same can be paid to the complainant and the case would thus come to an end. The accused also has liberty to make application on the very first day that he wants to compromise and in terms of the judgment given by Supreme Court in Damodar S. Prabhu (Supra) the court should dispose of the case by asking the accused to pay the cheque amount to complainant. The court should also bring to the notice of accused that incase he does not compromise at that stage, and if he enters

compromise at subsequent stages then he will have to pay costs in terms of judgment of Supreme Court.

5 Conclusion

The summary trial procedure to be followed for offences u/s 138 of Negotiable Instrument Act, 1881 would thus be as under:

5.1 On the day complaint is presented, if the complaint is accompanied by affidavit of complainant, the concerned Magistrate shall scrutinize the complaint and documents and if commission of offence is made out, take cognizance and direct issuance of summons of accused, against whom case is made out.

5.2 If the accused appears, the Magistrate shall ask him to furnish bail bond to ensure his appearance during trial and ask him to take notice u/s 251 Cr.P.C. and enter his plea of defence and fix the case for defence evidence, unless an application is made by an accused u/s 145(2) of N.I. Act for recalling a witness for cross examination on plea of defence.

5.3 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....

10. This case is squarely covered by the aforesaid judgment and the petitioners are guilty of gross abuse and misuse of the process of law as:-

10.1 The petitioners did not disclose their defence before the learned Metropolitan Magistrate in terms of the judgment of this Court in Rajesh Aggarwal (supra).

10.2 That apart, the petitioners have also not chosen to disclose their defence before this Court.

10.3 In para 2 of the petition, the petitioners have stated that the petitioners got the supplies from the respondent at Faridabad; the respondent issued the invoices in respect of the supplies at Faridabad office and each and every transaction took place at Faridabad. The petitioners further stated that the petitioners gave blank cheques to the respondent in good faith and against security in the month of September - October, 2009 and there is no debt or liability. However, the petitioners have failed to disclose the particulars of the sale transactions, invoices and supplies between the parties. As such, the petitioners are guilty of concealment of the true and relevant facts.

Imposition of Costs

11. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. The cost should be equal to the benefits derived by the litigants, and the harm and deprivation suffered by

the rightful person so as to check the frivolous litigations and prevent the people from reaping a rich harvest of illegal acts through Court. The costs imposed by the Courts must be the real costs equal to the deprivation suffered by the rightful person and also considering how long they have compelled the other side to contest and defend the litigation in various courts. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings. The parties raise fanciful claims and contests because the Courts are reluctant to order prosecution. The relevant judgments in support of this preposition are as under:-

11.1 In Rameshwari Devi and Others Vs. Nirmala Devi and Others, , the Supreme Court has held that the Courts have to take into consideration pragmatic realities and have to be realistic in imposing the costs. The relevant paragraphs of the said judgment are reproduced hereunder:-

52....C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

...

xxx xxx xxx

54. While imposing costs we have to take into consideration pragmatic realities and be realistic what the Defendants or the Respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc.

55. The other factor which should not be forgotten while imposing costs is for how long the Defendants or Respondents were compelled to contest and defend the litigation in various courts. The Appellants in the instant case have harassed the Respondents to hilt for four decades in a totally frivolous and dishonest litigation in various courts. The Appellants have also wasted judicial time of the various courts for the last 40 years.

56. On consideration of totality of the facts and circumstances of this case, we do not find any infirmity in the well reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which we quantify as Rs. 2,00,000/- (Rupees Two Lakhs only). We are imposing the costs not out of anguish but by following the fundamental principle that wrongdoers should not get benefit out of frivolous litigation.

(Emphasis supplied)

11.2 In *Maria Margarida Sequeria Fernandes and Others Vs. Erasmo Jack de Sequeria (Dead) through L. Rs.*, , the Supreme Court held that heavy costs and prosecution should be ordered in cases of false claims and defences as under:-

85. This Court in a recent judgment in *Ramrameshwari Devi and Ors.* (supra) aptly observed at page 266 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. In this very judgment, the Court provided that this problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation. The Court observed at pages 267-268 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

(Emphasis supplied)

11.3 In *Padmawati and Others Vs. Harijan Sewak Sangh*, , this Court imposed costs of Rs. 15.1 lakhs and noted as under:

6. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equa321 to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Courts. One of the aim of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person.

xxx xxx xxx

9. Before parting with this case, I consider it necessary to pen down that one of the reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right

and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrong doer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is real gain. This situation must be redeemed by the Courts.

(Emphasis supplied)

Conclusion

12. There is no merit in this petition. This petition amounts to gross abuse and misuse of process of law. The petitioners have succeeded in delaying the complaint before the Metropolitan Magistrate for more than two years. The petition is consequently dismissed with cost of Rs. 30,000/-. The cost be paid by the petitioners to the respondent within four weeks. The ex-parte interim order dated 17th August, 2011 is vacated. The Metropolitan Magistrate shall resume the proceedings forthwith and shall endeavour to complete the trial within six months. The parties shall appear before the Metropolitan Magistrate on 18th November, 2013. Copy of this judgment be sent to learned counsels for both the parties.