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(2015) 03 GUJ CK 0062

In the Gujarat High Court

Case No : Criminal Misc. Application (for Quashing and Set Aside F.I.R./Order) No. 9774 of 2014

Modern Denim Limited and Others — APPELLANT

Vs

State Of Gujarat and Others — RESPONDENT

Date of Decision : 24-03-2015

Acts Referred:
Companies Act, 1956 — Section 291
Criminal Procedure Code, 1973 (CrPC) — Section 138, 2(d), 200, 200, 200
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 142, 142, 142

Citation : (2016) ALLMR(Cri) 31 : (2015) GLH 3 668 : (2015) 2 GLR 1584 : (2015) 4 RCR(Criminal) 472

Hon'ble Judges : C.L. Soni, J.

Bench : Single Bench

Advocate : Hardik A. Dave, for the Appellant; Jirga Jhaveri, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

C.L. Soni, J.—By the present application filed under section 482 of the Code of Criminal Procedure, 1973, ("the Code") the applicants have prayed to quash the complaint filed by the respondent No. 2 for the offence under section 138 of the Negotiable Instruments Act ("the Act") which is registered as Criminal Case No. 654/2014.

2. Learned Advocate Mr. Hardik Dave appearing for the applicants submitted that in absence of valid notice of demand, the complaint under section 138 of the Act is not maintainable. Taking the Court through notice dated 18.1.2014, at annexure-B, Mr. Dave submitted that the demand for payment made in the notice is not for the cheque amount and, therefore, it is no demand notice in the eye of law. Mr. Dave submitted that no specific averments are made in the complaint as regards involvement of the applicants in day to day business of the company or to show that as Directors of the Company, the applicants are responsible for conduct of the business of the Company. Mr. Dave submitted that

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in absence of such averments in the complaint against the applicants, the complaint under section 138 of the Act against the applicants is not maintainable. Mr. Dave submitted that the applicants No. 2 to 4 are residing beyond the territorial jurisdiction of the learned Metropolitan Magistrate, Ahmedabad and therefore no process could have been issued against them without following the mandate of holding inquiry at first stage as provided in section 202 of the Code. Mr. Dave submitted that the respondent No. 2 complainant has not filed the affidavit of chief examination but has filed verification affidavit and such verification affidavit could not be considered by the learned Magistrate for the purpose of issuing process against the applicants as the law requires filing of separate affidavit of chief examination of the complainant with the complaint. Mr. Dave submitted that the order passed by the learned Magistrate issuing process on the complaint reflects non-application of mind by the learned Magistrate in as much as the learned Magistrate has not discussed whether the requirements of section 143 and 145 of the Act read with section 200 to 202 of the Code are satisfied. In support of his submissions, Mr. Dave has relied on the decision in the case of K.R. Indira Vs. Dr. G. Adinarayana, , Indra Kumar Patodia and Another Vs. Reliance Industries Ltd. and Others, , Kamla Chaturvedi Vs. National Insurance Co. and Others, , National Bank of Oman Vs. Barakara Abdul Aziz and Another, .

3. Learned Advocate Mr. Shah appearing for respondent No. 2 submitted that the demand in statutory notice issued by respondent No. 2 is in respect of the amount covered by the dishonoured cheque and, therefore, the notice is legal and valid. Mr. Shah submitted that the respondent No. 2 has clearly averred in the complaint that the applicants are involved in day to day business and the administration of the company and are responsible to the company for conduct of its business. Mr. Shah submitted that in view of such averments made in the complaint, the argument that the applicants were not responsible for conduct of the business of the company could be considered at this stage in absence of any concrete material before the Court. Mr. Shah submitted that the provisions of section 142 to 145 of the Act are held to have overriding effect over the provisions of the Code and the use of non-obstante clause in the said provisions of the Act would make it abundantly clear that the learned Magistrate is not to hold inquiry as per section 202 of the Code before issuing process for the offence under section 138 of the Act. Mr. Shah submitted that separate affidavit of chief examination is filed with the complaint which has been rightly relied by the learned Magistrate for issuance of process against the applicants. Mr. Shah submitted that even if such separate affidavit is considered to be verification of the complaint on oath, then also, it was the discretion of the learned Magistrate to issue process on the basis of such verification of the complaint without calling for any further affidavit as evidence of the complainant. Mr. Shah submitted that the order passed by the learned Magistrate for issuance of process reveals application of mind by the learned Magistrate as it is clearly mentioned that the process is issued after considering the complaint, the affidavit of the

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complainant, and the other documentary evidence. Mr. Shah has relied on the judgments in the case of A.C. Narayanan Vs. State of Maharashtra and Another, , Shivjee Singh Vs. Nagendra Tiwary and Others, , Indian Bank Association and Others Vs. Union of India (UOI) and Another, .

4. Learned A.P.P. Ms. Jirga Jhaveri has supported the order issuing process by submitting that the same is in consonance with the law laid down by the Hon''ble Supreme Court in the case of Indian Bank Association and others (supra) and A.C. Narayanan (supra).

5. Having heard the learned Advocates for the parties, as regards the first contention, the Court finds on perusal of the notice dated 18.1.2014 at annexure-B that a clear demand for payment of the cheque amount within fifteen days from the date of receipt of the notice is made. It is stated in paragraph 2 of the notice that a cheque dated 1.12.2013 for Rs. 13,73,109.00 in favour of the proprietary concern of respondent No. 2 duly signed by accused No. 5 and 7 -- applicants No. 5 and 7 respectively when issued, all the accused assured respondent No. 2 that if respondent No. 2 deposited the cheque, the same would be honoured. It is further stated that after the cheque was dishonoured on the ground of "fund insufficient", when respondent No. 2 informed the accused about such dishonour, was assured that within fifteen days, the amount of cheque shall be transferred in his account and thereafter on 15.1.2014, the applicants deposited Rs. 50,000.00 but Rs. 13,23,109.00 remained due to be paid by the accused.

6. Learned Advocate Mr. Dave, however, submitted that since the cheque was originally for Rs. 13,73,109.00 out of which Rs. 50,000.00 was paid to respondent No. 2 and since the notice is given making demand for the remaining amount of Rs. 13,23,109.00, same cannot be considered to be the demand notice for the cheque amount. Such contention cannot be accepted as the notice issued is subsequent to the dishonour of the cheque and the demand made in the notice is for the amount covered under the cheque except the amount of Rs. 50,000.00 paid to respondent No. 2. The notice is not for any amount other than the amount covered in the cheque. Therefore, the contention that the notice issued was not legal or valid as there is no demand for the cheque amount and therefore, the complaint for the offence under section 138 of the Act is not maintainable, cannot be accepted.

In the case of K.R. Indra (supra), Hon''ble Supreme Court on perusal of the notice found that no specific demand was made for payment of the amount covered by the cheque. The Court observed that not only the cheque amounts were different from the alleged loan amount but the demand was made not of the cheque amount but only loan amount. The Court further observed that what is necessary is making of demand for payment of the amount covered by the bounced cheque which was conspicuously absent in the notice.

Therefore, the decision in the said case on the validity of the notice was on the

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facts of the said case whereas in the present case, as observed by this Court, there is specific demand in connection with the amount covered by the cheque.

7. As regards second contention raised by Mr. Dave that since there are no specific averments in the complaint that the applicants were responsible for the conduct of the business of the company, the complaint against the applicants is not maintainable, the Court finds on perusal of the contents of the complaint that the complainant has made specific averments in para 3 of the complaint that the accused No. 2 - applicant No. 2 is the Managing Director of the Company, accused No. 3, 4 and 5 - applicants No. 3, 4 and 5 respectively are the All Time Directors of the Company, accused No. 6 - applicant No. 6 is the Secretary of the Company, accused No. 7 - applicant No. 7 is the authorized person of the company, and that the accused No. 2 to 7 - applicants No. 2 to 7 are involved in day to day business and administration of the company and are responsible persons of the company. It is further stated in the complaint that the applicants No. 5 and 7 have signed the cheque as authorized persons and all other accused have given assurance for acceptance and clearance of the cheque on deposit of the cheque by the complainant in his account.

8. Section 141 of the Act provides that every person who, at the time the offence was committed, was in charge of, and 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 accordingly. First proviso to the said section would exonerate a person from the punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence. Second proviso saves only those directors from prosecution who are nominated by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be. However, sub-section (2) which starts with non-obstante clause clearly provides that where any offence under the Act has been committed by a company with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Therefore, when there are averments that the applicants were in charge of day to day business of the company and were responsible for the conduct of the business of the company and when there are also averments that all the applicants had assured for honouring the cheque, on proof of such allegations in the complaint, even non-signatory directors and the office bearers of the company stated to be responsible for the conduct of the business of the Company could be held guilty for the offences under the Act.

9. In the case of N. Rangachari Vs. Bharat Sanchar Nigam Ltd., , the Hon''ble Supreme Court has held and observed in para 13 to 19 as under:

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13. A Company, though a legal entity, cannot act by itself but can only act through its directors. Normally, the Board of Directors act for and on behalf of the company. This is clear from Section 291 of the Companies Act which provides that subject to the provisions of that Act, the Board of Directors of a Company shall be entitled to exercise all such powers and to do all such acts and things as the Company is authorized to exercise and do. Palmer described the position thus:

"A company can only act by agents, and usually the persons by whom it acts and by whom the business of the company is carried on or superintended are termed directors....."

It is further stated in Palmer that:

"Directors are, in the eye of the law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors."

The above two passages were quoted with approval in R.K. Dalmia Vs. Delhi Administration, . In Guide to the Companies Act by A. Ramaiya (Sixteenth Edition) this position is summed up thus:

"All the powers of management of the affairs of the company are vested in the Board of Directors. The Board thus becomes the working organ of the company. In their domain of power, there can be no interference, not even by shareholders. The directors as a board are exclusively empowered to manage and are exclusively responsible for that management."

Therefore, a person in the commercial world having a transaction with a company is entitled to presume that the directors of the company are in-charge of the affairs of the company. If any restrictions on their powers are placed by the memorandum or articles of the company, it is for the directors to establish it at the trial. It is in that context that Section 141 of the Negotiable Instruments Act provides that when the offender is a company, every person, who at the time when the offence was committed was in charge of and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty of the offence along with the company. It appears to us that an allegation in the complaint that the named accused are directors of the company itself would usher in the element of their acting for and on behalf of the company and of their being in charge of the company. In Gower and Davies'' Principles of Modern Company Law (Seventh Edition), the theory behind the idea of identification is traced as follows:

10. "It is possible to find in the cases varying formulations of the under-lying principle, and the most recent definitions suggest that the courts are prepared today to give the rule of attribution based on identification a somewhat broader scope. In the original formulation in the Lennard''s Carrying Company case Lord Haldane based identification on a person "who is really the directing mind and

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will of the corporation, the very ego and centre of the personality of the corporation". Recently, however, such an approach has been castigated by the Privy Council through Lord Hoffmann in the Meridian Global case as a misleading "general metaphysic of companies". The true question in each case was who as a matter of construction of the statute in question, or presumably other rule of law, is to be regarded as the controller of the company for the purpose of the identification rule."

But as has already been noticed, the decision in S.M.S. Pharmaceuticals Ltd. (supra) binding on us, has postulated that a director in a company cannot be deemed to be incharge of and responsible to the company for the conduct of his business in the context of Section 141 of the Act. Bound as we are by that decision, no further discussion on this aspect appears to be warranted.

14. A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its Memorandum or Articles of Association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are incharge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of I.T. So, all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position.

15. In fact, in an earlier decision in Monaben Ketanbhai Shah and Another Vs. State of Gujarat and Others, , two learned judges of this Court noticed that: "The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind."

16. In the light of the ratio in S.M.S. Pharmaceuticals Ltd. (supra) what is to be looked into is whether in the complaint, in addition to asserting that the appellant and another are the directors of the company, it is further alleged that they are incharge of and responsible to the company for the conduct of the business of the company. We find that such an allegation is clearly made in the complaint which we have quoted above. Learned Senior Counsel for the appellant argued that in Saroj Kumar Poddar case (supra), this Court had found the complaint unsustainable only for the reason that there was no specific averment that at the time of issuance of the cheque that was dishonoured, the persons named in the complaint were incharge of the affairs of the company. With great respect, we see no warrant for assuming such a position in the context of the binding ratio in S.M.S. Pharmaceuticals Ltd. (supra) and in view of the position of

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the Directors in a company as explained above.

17. In Rajesh Bajaj Vs. State NCT of Delhi and Others, , two learned judges of this Court stated:

"For quashing an F.I.R. (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence."

11. In M/s. Bilakchand Gyanchand Co. Vs. A. Chinnaswami, , this Court held that a complaint under Section 138 of the Act was not liable to be quashed on the ground that the notice as contemplated by Section 138 of the Act was addressed to the Director of the Company at its office address and not to the Company itself. The view was reiterated in Rajneesh Aggarwal Vs. Amit J. Bhalla, . These decisions indicate that too technical an approach on the sufficiency of notice and the contents of the complaint is not warranted in the context of the purpose sought to be achieved by the introduction of Sections 138 and 141 of the Act.

18. In the case on hand, reading the complaint as a whole, it is clear that the allegations in the complaint are that at the time at which the two dishonoured cheques were issued by the company, the appellant and another were the Directors of the company and were incharge of the affairs of the company. It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole are not sufficient to show that at the relevant point of time the appellant and the other are not alleged to be persons incharge of the affairs of the company. Obviously, the complaint refers to the point of time when the two cheques were issued, their presentment, dishonour and failure to pay in spite of notice of dishonour. We have no hesitation in overruling the argument in that behalf by the learned Senior Counsel for the appellant.

19. We think that, in the circumstances, the High Court has rightly come to the conclusion that it is not a fit case for exercise of jurisdiction under Section 482 of the Code of Criminal Procedure for quashing the complaint. In fact, an advertence to Sections 138 and 141 of the Negotiable Instruments Act shows that on the other elements of an offence under Section 138 being satisfied, the burden is on the Board of Directors or the Officers incharge of the affairs of the company to show that they are not liable to be convicted. Any restriction on their power or existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial such a restriction or to show that at the relevant time they were not incharge of the affairs of the company. Reading the complaint as a whole, we are satisfied that it is a case where the contentions sought to be raised by the appellant can only be dealt with after the conclusion of the trial."

10. In the case of Gunmala Sales Private Ltd. Vs. Anu Mehta, , the Hon''ble Supreme Court held and observed in para 28, 29, 30 and 31, and summarized the conclusions in para 34, as under:

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28. We are concerned in this case with Directors who are not signatories to the cheques. So far as Directors who are not signatories to the cheques or who are not Managing Directors or Joint Managing Directors are concerned, it is clear from the conclusions drawn in the above-mentioned cases that it is necessary to aver in the complaint filed under Section 138 read with Section 141 of the NI Act that at the relevant time when the offence was committed, the Directors were in charge of and were responsible for the conduct of the business of the company. This is a basic requirement. There is no deemed liability of such Directors. This averment assumes importance because it is the basic and essential averment which persuades the Magistrate to issue process against the Director. That is why this Court in SMS Pharma-(1) observed that the question of requirement of averments in a complaint has to be considered on the basis of provisions contained in Sections 138 and 141 of the NI Act read in the light of the powers of a Magistrate referred to in Sections 200 to 204 of the Code which recognize the Magistrate''s discretion to reject the complaint at the threshold if he finds that there is no sufficient ground for proceeding. Thus, if this basic averment is missing the Magistrate is legally justified in not issuing process. But here we are concerned with the question as to what should be the approach of a High Court when it is dealing with a petition filed under Section 482 of the Code for quashing such a complaint against a Director. If this averment is there, must the High Court dismiss the petition as a rule observing that the trial must go on? Is the High Court precluded from looking into other circumstances if any? Inherent power under Section 482 of the Code is to be invoked to prevent abuse of the process of any court or otherwise to secure ends of justice. Can such fetters be put on the High Court''s inherent powers? We do not think so.

29. SMS Pharma-(1), undoubtedly, says that it is necessary to specifically aver in the complaint that the Director was in charge of and responsible for the conduct of the company''s business at the relevant time when the offence was committed. It says that this is a basic requirement. And as we have already noted, this averment is for the purpose of persuading the Magistrate to issue process. If we revisit SMS Pharma-(1), we find that after referring to the various provisions of the Companies Act it is observed that those provisions show that what a Board of Directors is empowered to do in relation to a particular company depends upon the roles and functions assigned to Directors as per the memorandum and articles of association of the company. There is nothing which suggests that simply by being a Director in a company, one is supposed to discharge particular functions on behalf of a company. As a Director he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of one or two Directors out of the Board of the company who may be made responsible for the day-today functions of the company. This Court further observed that what emerges from this is that the role of a Director in a company is a question of fact depending on the peculiar facts in each case and that there is no universal rule

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that a Director of a company is in charge of its everyday affairs. What follows from this is that it cannot be concluded from SMS Pharma-(1) that the basic requirement stated therein is sufficient in all cases and whenever such an averment is there, the High Court must dismiss the petition filed praying for quashing the process. It must be remembered that the core of a criminal case are its facts and in factual matters there are no fixed formulae required to be followed by a court unless it is dealing with an entirely procedural matter. We do not want to discuss ''the doctrine of Indoor Management'' on which submissions have been advanced. Suffice it to say, that just as the complainant is entitled to presume in view of provisions of the Companies Act that the Director was concerned with the issuance of the cheque, the Director is entitled to contend that he was not concerned with the issuance of cheque for a variety of reasons. It is for the High Court to consider these submissions. The High Court may in a given case on an overall reading of a complaint and having come across some unimpeachable evidence or glaring circumstances come to a conclusion that the petition deserves to be allowed despite the presence of the basic averment. That is the reason why in some cases, after referring to SMS Pharma-(1), but considering overall circumstances of the case, this Court has found that the basic averment was insufficient, that something more was needed and has quashed the complaint.

30. When a petition is filed for quashing the process, in a given case, on an overall reading of the complaint, the High Court may find that the basic averment is sufficient, that it makes out a case against the Director; that there is nothing to suggest that the substratum of the allegation against the Director is destroyed rendering the basic averment insufficient and that since offence is made out against him, his further role can be brought out in the trial. In another case, the High Court may quash the complaint despite the basic averment. It may come across some unimpeachable evidence or acceptable circumstances which may in its opinion lead to a conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the company at the offence is made out against him.

31. When in view of the basic averment process is issued the complaint must proceed against the Directors. But, if any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the cheque, he must in order to persuade the High Court to quash the process either furnish some sterling uncontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be abuse of the process of court. He cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be quashed for the asking.

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For quashing of a complaint it must be shown that no offence is made out at all against the Director.

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34. We may summarize our conclusions as follows:

34.1. Once in a complaint filed under Section 138 read with Section 141 of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director;

34.2. If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director.

34.3. In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about role of the Director in the complaint. It may do so having come across some unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of the process of the court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed;

34.4. No restriction can be placed on the High Court''s powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but, nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director."

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11. In light of the above, when there are specific and basic averments made in the complaint as stated above, it was for the applicants to furnish some concrete or uncontrovertable material which could be accepted to conclude that the averments made as regards their involvement in day to day business or they being responsible for conduct of the business of the company are not acceptable and made just to drag them to face the criminal proceedings. In absence of any such material, it is for the applicants to discharge the burden of proving that they were not involved and responsible in any manner for the conduct of the business of the company during the trial.

12. As regards third contention about holding inquiry as per section 202 of the Code and two other contentions that in absence of separate affidavit of chief examination of the complainant and that the learned Magistrate has issued process without application of mind, the Court finds that considering the object of the introducing amended provisions in the Act and overriding effect given to such provisions of the Act over the provisions of the Code, there is no merit in any of such contentions.

13. Learned Advocate Mr. Dave however submitted that in the case of Indra Kumar Patodia (supra), Hon''ble Supreme Court has held that the non-obstante clause in section 142 is limited to only exclusion of oral complaint and exclusion of cognizance of offence on the complaint by anybody other than the payee or the holder in due course. Relying on the said judgment, Mr. Dave therefore submitted that since the learned Magistrate is to follow the procedure of section 200 and 202 of the Code before issuing process, except the limited exclusion of the provisions as held in the above referred judgment, the learned Magistrate was required to follow the mandate given in section 202 of holding inquiry of the Code before issuing the process against the applicants who are not within his jurisdiction.

14. However, on reading the said judgment, it appears that the Hon''ble Court has examined the effect of non-obstante clause used in section 142 of the Act and held and observed in para 12 and 15 as under:

"12) It is clear that the non obstante clause has to be given restricted meaning and when the section containing the said clause does not refer to any particular provisions which intends to over ride but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. In other words, there requires to be a determination as to which provisions answers the description and which does not. While interpreting the non obstante clause, the Court is required to find out the extent to which the legislature intended to do so and the context in which the non obstante clause is used. We have already referred to the definition of complaint as stated in Section 2(d) of the Code which provides that the same needs to be in oral or in writing. The non obstante clause, when it refers to the Code only excludes the oral part in such definition.

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15) In the case on hand, the complaint was presented in person on June 3, 1998 and on the direction by the Magistrate, the complaint was verified on July 30, 1998 and duly signed by the authorized officer of the Company-the complainant. As rightly pointed out by the Division Bench, no prejudice has been caused to the accused for non-signing the complaint. The statement made on oath and signed by the complainant safeguards the interest of the accused. In view of the same, we hold that the requirements of Section 142(a) of the Act is that the complaint must necessarily be in writing and the complaint can be presented by the payee or holder in due course of the cheque and it need not be signed by the complainant. In other words, if the legislature intended that the complaint under the Act, apart from being in writing, is also required to be signed by the complainant, the legislature would have used different language and inserted the same at the appropriate place. In our opinion, the correct interpretation would be that the complaint under Section 142(a) of the Act requires to be in writing as at the time of taking cognizance, the Magistrate will examine the complainant on oath and the verification statement will be signed by the complainant."

15. Thus, the Hon''ble Supreme Court construed the non-obstante clause of section 142 only which provides for taking cognizance of the offences. In the said case, the Hon''ble Supreme Court was neither called upon to decide nor decided what would be the extent of exclusion of the provisions of the Code as regards non-obstante clause used in section 143 to 145 of the Act.

16. Section 143 of the Act which starts with non obstante clause provides that the offences under the Chapter XVI of the Act shall be tried by the Judicial Magistrate of First Class or the Metropolitan Magistrate and the provisions of section 262 to 265 (both inclusive) of the Code shall, as far as may be, apply to such trials. Then, it further provides for the powers of the Magistrate for conviction in summary trial and to follow further procedure as mentioned therein, if the Magistrate finds it undesirable to try the case summarily.

17. Section 144 of the Act which prescribes Mode of service of summons also starts with non-obstante clause. Section 145 then provides for giving of evidence by the complainant on affidavit which could be read in evidence in any inquiry, trial or other proceedings under the Code. Reading the above said three provisions together, it clearly appears that the process to be issued on the complaint for the offence under section 138 is as per the procedure contained in the above said provisions read with the provision of the Code for such purpose which are not to be deemed or treated excluded by virtue of non-obstante clause in section 143 to 145.

18. It appears that the basic object for providing non-obstante clause is to do away with the procedure to be followed as per section 200 to 202 in its rigidity to see that the trial of the complaint for the offence under section 138 of the Act is concluded without any inordinate delay. Therefore, when section 143 of the Act provides that the provisions of section 262 to 265 of the Code shall, as far as may be, applied to the trial for the offence under section 138 of the Code, the

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legislature while employing the non-obstante clause intended to permit following simple procedure meant for trial of summons cases by the Magistrate and such provisions would override the requirement of holding inquiry under section 202 of the Code before issuing process to the accused residing out side the jurisdiction of the Magistrate.

19. Reliance placed by Mr. Dave in the case of National Bank of Oman (supra) to press for his point that holding of inquiry by the Magistrate is mandatorily required before issuing process to the accused residing beyond the jurisdiction of the Magistrate will be of no help to the applicants as the complaint in the said case was not for the offence under section 138 of the Act. In such view of the matter, it is not possible to accept the contention of Mr. Dave that the mandatory requirement of holding inquiry under section 202 of the Code before issuing the process to the applicants who resided out side the jurisdiction of the Magistrate was required to be followed by the learned Magistrate.

20. On the issue of filing separate affidavit of chief examination, the Court finds that the complainant has filed separate affidavit with the complaint. Such affidavit clearly refers the factum of issuance of cheque, dishonour of the cheque and of issuance of the statutory demand notice. Simply because in the affidavit it is stated that the accused had given assurance of paying Rs. 13,23,109.00 would not render the issuance of process illegal on the ground that there was no affidavit of chief examination. The Court finds that such affidavit is separate and satisfies the requirement of section 145 of the Act for issuance of process against the applicants.

21. In the case of Mandvi Co-op. Bank Ltd. Vs. Nimesh B. Thakore, , the Hon''ble Supreme Court has held and observed in para No. 20, 22, 23, 25 and 29 as under:

20. It may be noted that the provisions of sections 143, 144, 145 and 147 expressly depart from and override the provisions of the Code of Criminal Procedure, the main body of adjective law for criminal trials. The provisions of section 146 similarly depart from the principles of the Indian Evidence Act. Section 143 makes it possible for the complaints under section 138 of the Act to be tried in the summary manner, except, of course, for the relatively small number of cases where the Magistrate feels that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily.

22. Sub-section (3) of section 143 mandates that the trial would proceed, as far as practicable, on a day-today basis and sub-section (4) of the section requires the Magistrate to make the endeavour to conclude the trial within six months from the date of filing of the complaint. Section 144 makes the process of service of summons simpler and cuts down the long time ordinarily consumed in service of summons in a regular civil suit or a criminal trial.

23. Section 145 with its non obstante clause, as noted above, makes it possible

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for the evidence of the complainant to be taken in the absence of the accused. But the affidavit of the complainant (or any of his witnesses) may be read in evidence "subject to all just exceptions". In other words, anything inadmissible in evidence, e.g., irrelevant facts or hearsay matters would not be taken in as evidence, even though stated on affidavit. Section 146, making a major departure from the principles of the Evidence Act provides that the Bank''s slip or memo with the official mark showing that the cheque was dishonoured would by itself give rise to the presumption of dishonour of the cheque, unless and until that fact was disproved. Section 147 makes the offences punishable under the Act, compoundable.

25. It is not difficult to see that sections 142 to 147 lay down a kind of a special Code for the trial of offences under Chapter XVII of the Negotiable Instruments Act and sections 143 to 147 were inserted in the Act by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to do away with all the stages and processes in a regular criminal trial that normally cause inordinate delay in its conclusion and to make the trial procedure as expeditious as possible without in any way compromising on the right of the accused for a fair trial. Here we must take notice of the fact that cases under section 138 of the Act have been coming in such great multitude that even the introduction of such radical measures to make the trial procedure simplified and speedy has been of little help and cases of dishonoured cheques continue to pile up giving rise to an unbearable burden on the criminal court system.

29. Once it is realized that sections 143 to 147 were designed especially to lay down a much simplified procedure for the trial of dishonoured cheque cases with the sole object that the trial of those cases should follow a course even swifter than a summary trial and once it is seen that even the special procedure failed to effectively and expeditiously handle the vast multitude of cases coming to the court, the claim of the accused that on being summoned under section 145(2), the complainant or any of his witnesses whose evidence is given on affidavit must be made to depose in examination-in-chief all over again plainly appears to be a demand for meaningless duplication, apparently aimed at delaying the trial."

22. In the case of Indian Bank Association and others (supra), the Hon''ble Supreme Court has held and observed in para No. 16, 18, 20, 22 and 23 as under:

"16. Considerable time is usually spent for recording the statement of the complainant. The question is whether the Court can dispense with the appearance of the complainant, instead, to take steps to accept the affidavit of the complainant and treat the same as examination-in-chief. Section 145(1) gives complete freedom to the complainant either to give his evidence by way of affidavit or by way of oral evidence. The Court has to accept the same even if it is given by way of an affidavit. Second part of Section 145(1) provides that the complainant''s statement on affidavit may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceedings. Section 145 is a rule of

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procedure which lays down the manner in which the evidence of the complainant may be recorded and once the Court issues summons and the presence of the accused is secured, an option be given to the accused whether, at that stage, he would be willing to pay the amount due along with reasonable interest and if the accused is not willing to pay, Court may fix up the case at an early date and ensure day-to-day trial.

18. We have indicated that under Section 145 of the Act, the complainant can give his evidence by way of an affidavit and such affidavit shall be read in evidence in any inquiry, trial or other proceedings in the Court, which makes it clear that a complainant is not required to examine himself twice i.e. one after filing the complaint and one after summoning of the accused. 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. In other words, there is no necessity to recall and re-examine the complaint 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 under Section 145(2) of the Act suo moto by the Court. In summary trial, after the accused is summoned, his plea is to be recorded under Section 263(g) Cr.P.C. and his examination, if any, can be done by a Magistrate and a finding can be given by the Court under Section 263(h) Cr.P.C. and the same procedure can be followed by a Magistrate for offence of dishonour of cheque since offence under Section 138 of the Act is a document based offence. We make it clear that if the proviso (a), (b) and (c) to Section 138 of the Act are shown to have been complied with, technically the commission of the offence stands completed and it is for the accused to show that no offence could have been committed by him for specific reasons and defences.

20. Amendment Act, 2002 has to be given effect to in its letter and spirit. Section 143 of the Act, as already indicated, has been inserted by the said Act stipulating that notwithstanding anything contained in the Code of Criminal Procedure, all offences contained in Chapter XVII of the Negotiable Instruments Act dealing with dishonour of cheques for insufficiency of funds, etc. shall be tried by a Judicial Magistrate and the provisions of Sections 262 to 265 Cr.P.C. prescribing procedure for summary trials, shall apply to such trials and it shall be lawful for a Magistrate to pass sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding Rs. 5,000/- and it is further provided that in the course of a summary trial, if it appears to the Magistrate that the nature of the case requires passing of the sentence of imprisonment exceeding one year, the Magistrate, after hearing the parties, record an order to that effect and thereafter recall any witness and proceed to hear or rehear the case in the manner provided in Criminal Procedure Code.

22. We notice, considering all those aspects, few High Courts of the country have laid down certain procedures for speedy disposal of cases under Section 138 of

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the Negotiable Instruments Act. Reference, in this connection, may be made to the judgments of the Bombay High Court in KSL and Industries Ltd. v. Mannalal Khandelwal, Indo International Ltd. and another v. State of Maharashtra and Harischandra Biyani v. Stock Holding Corporation of India Ltd., the judgment of the Calcutta High Court in Magma Leasing Ltd. v. State of West Bengal and the judgment of the Delhi High Court in Rajesh Agarwal v. State.

23. Many of the directions given by the various High Courts, in our view, are worthy of emulation by the Criminal Courts all over the country dealing with cases under Section 138 of the Negotiable Instruments Act, for which the following directions are being given:-

DIRECTIONS:

1) Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

2) MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. Court, in appropriate cases, may take the assistance of the police or the nearby Court to serve notice to the accused. For notice of appearance, a short date be fixed. If the summons is received back un-served, immediate follow up action be taken.

3) Court may indicate in the summon that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, Court may pass appropriate orders at the earliest.

4) Court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251 Cr.P.C. to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for re-calling a witness for cross-examination.

5) The Court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The Court has option of accepting affidavits of the witnesses, instead of examining them in Court. Witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court."

23. In the case of A.C. Narayanan (supra), the Hon''ble Supreme Court has held and observed in paragraph 29 as under:

"29. From a conjoint reading of Sections 138, 142 and 145 of the N.I. Act as well as Section 200 of the Code, it is clear that it is open to the Magistrate to issue

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process on the basis of the contents of the complaint, documents in support thereof and the affidavit submitted by the complainant in support of the complaint. Once the complainant files an affidavit in support of the complaint before issuance of the process under Section 200 of the Code, it is thereafter open to the Magistrate, if he thinks fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. However, it is a matter of discretion and the Magistrate is not bound to call upon the complainant to remain present before the Court and to examine him upon oath for taking decision whether or not to issue process on the complaint under Section 138 of the N.I. Act. For the purpose of issuing process under Section 200 of the Code, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I. Act. It is only if and where the Magistrate, after considering the complaint under Section 138 of the N.I. Act, documents produced in support thereof and the verification in the form of affidavit of the complainant, is of the view that examination of the complainant or his witness(s) is required, the Magistrate may call upon the complainant to remain present before the Court and examine the complainant and/or his witness upon oath for taking a decision whether or not to issue process on the complaint under Section 138 of the N.I. Act." 24. Thus, it appears that considering the object of amendment of 2002 brought in the Act, the procedure for complaint of the offences under section 138 of the Act is made simple and even it is left open to the learned Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint for issuance of the process to the accused. In such view of the matter, there is no substance in the contention of the learned advocate Mr. Dave that there is no affidavit separately filed for chief examination and that the so called affidavit since is a verification of the complainant, the learned Magistrate could not have issued process relying upon such verification of the complaint.

25. As regards the order made by the learned Magistrate below the complaint for issuance of the process, it appears that the learned Magistrate has considered the complaint, affidavit of the complainant and other documents and then has found that there are sufficient reasons and grounds to issue process against the applicants for the offence under section 138 of the Act. Simply because the learned Magistrate has not referred the provisions of section 143 of the Act while passing the order would not be a ground to say that the learned Magistrate has not applied his mind while issuing process against the applicants. The Court finds that the learned Magistrate has issued process in due compliance of the provisions of the Act and in consonance with the law laid down by the Hon''ble Supreme Court in the above referred judgments.

26. For the reasons stated above, the application is rejected. Notice discharged. Interim relief stands vacated.

27. At this stage, learned Advocate Mr. Dave request to extent the interim relief,

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which is in operation, for a period of three weeks to enable the applicants to approach the higher forum. Such request is opposed by the learned advocate Mr. Shah appearing for respondent No. 2. However, the Court finds that since the interim relief is already in operation till to-day, the interests of justice would be sub-served if the interim relief is extended for a further period of three weeks from today. Hence the interim relief in operation shall continue for a further period of three weeks from today.

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