

(2021) 03 DEL CK 0091

In the Delhi High Court

Case No : Criminal Miscellaneous Case No. 296 Of 2021, Criminal Miscellaneous Application No. 1529 Of 2021

Sumit Bhasin

APPELLANT

Vs

State Of Nct Of Delhi & Anr

RESPONDENT

Date of Decision : 10-03-2021

Acts Referred:

Negotiable Instruments Act, 1881 — Section 118, 138, 139, 142, 143, 144, 145, 145(1), 145(2), 146, 147
Code Of Criminal Procedure, 1973 — Section 251, 263(g), 482
Evidence Act, 1872 — Section 106
General Clauses Act, 1897 — Section 27

Citation : (2021) 03 DEL CK 0091

Hon'ble Judges : Rajnish Bhatnagar, J

Bench : Single Bench

Advocate : Mandeep Singh Vinaik, Mukesh Kumar, Sonal Anand

Final Decision : Dismissed

Judgement

Rajnish Bhatnagar, J

1. The present petition U/s 482 Cr.P.C. has been filed by the petitioner with the following prayers:-

It is therefore most respectfully prayed that this Hon'ble Court be pleased to set aside the impugned order dated 16.12.2020 passed in

Revision Petition No. 97/2020, by the learned District and Sessions Judge, West District, Tis Hazari Courts, Delhi, and quash the complaint filed by the

Respondent no.2, being CC No. 7398/19, pending before the Metropolitan Magistrate, West District, Tis Hazari Courts, Delhi against the petitioner.

2. The facts of the case are that in January-2009, accused No-2 Guneet Bhasin. accused No. 3 Sumit Bhasin (Petitioner herein) and accused No.4

Smt. Summy Bhasin approached Respondent No 2/Complainant and allured him into investing Rs 50 lacs in their company with the assurance that

same would be doubled in five years and relying on such assurances, he invested his lifetime savings with them; and in March-2014 the accused

persons failed to return the principal amount with interest being total of Rs 1 Crore but then he was further inducted to invest Rs 20 lacs more with the

promise to return Rs. 2 crores on or before March-2019 and that MoU dated 26.07.2018 was executed, whereby accused persons undertook to pay

the complainant a sum of Rs.47,53,519/- and a cheque was also issued; and that later MoU dated 05.05.2019 was executed and it was promised that

the complainant would be made a partner in the business and receipt of Rs. 50 lacs as principal amount was retained with the promise that it would be

safe and secure with them and it would become Rs. 2 crores in 2019: and that on 18.02.2019 another Promissory Note was issued by accused No.2/

Guneet Bhasin in favour of the complainant and his wife acknowledging liability to pay an amount of Rs. 2,47,53,000/- payable to the complainant and

his wife on or before 30.06.2019.

3. On 16.07.2019 nine cheques were issued in the tune of Rs. 73,00,000/-. The said cheques on presentation were dishonored, and while cheque at Sr

No. 1 was dishonored for the reasons ""account closed"", the bank returning memos in respect of other cheques from Sr. Nos. 2 to 9 came with the

remarks ""kindly contact drawer"".

4. On receipt of such returning memos dated 17.07.2019, Respondent No 2 served a legal notice dated 12.08.2019 upon the accused persons, which

were duly served upon them and even replied through their counsel vide reply dated 27.08.2019, but since no payment was made under the cheque,

the complaint was filed on 19.9.2019 by respondent no 2/Complainant.

5. The Petitioner has assailed the Order dated 04.10.2019 vide which he was summoned by the Ld. MM for offences U/s 138 of the N.I. Act The

Petitioner has approached this Hon'ble Court already having availed opportunity under S. 397 Cr.P.C. wherein the Ld. District and Sessions Judge,

District West - Tis Harari Courts has dismissed the Revision petition vide Order dated 16.12.2020 The Petitioner seeks quashing of the present

proceedings inter-alia on grounds that while he is admittedly a Director, however, he did not sign the cheques in question nor he ever participated in

the transactions in question and merely because he was Director of the company at the relevant time does not make him vicariously responsible for

the acts and omissions on the part of the remaining Directors or the accused company itself and hence has no role in the offence.

6. It is vehemently urged by the counsel of the petitioner that there are no allegations against the petitioner as to what role he played in the issuance of

cheque and there is no clear averment that he was in charge or responsible for the day to day affairs of the company, It was further submitted that

summoning order has far reaching consequences and the impugned order suffers from complete non-application of mind. In his submissions, learned

counsel has place reliance upon:

a. Sudeep Jain vs. ECE Industries 201 (2013) Delhi Law Times 461

b. National Small Industries Corporation Ltd. vs. Harmeet Singh Paintal & Anr (2010) 3 SC 330

c. Sunil Bharti Mittal versus CBI (2015) 4 SCC 609

d. Milind Shripad Chandurkar vs. Kalim M. Khan & Anr.: (2011) 4 SCC 275

7. On the other hand, it is argued by the Ld. Counsel for Respondent No. 2 that International Trenching Pvt. Ltd. is a family concern of the Accused

No. 2 to 4 wherein the present Petitioner is an executive/whole time director. It is pertinent to note that from the Annual Return of the International

Trenching Pvt. Ltd. as filed by the Petitioner, it is evident that the Petitioner is holding approximately 50% of shareholding in the company and is

categorically stated to be a key managerial personnel. He has attended each and every Board meeting and AGM of the said company and is drawing a

salary of Rs. 6,60,000/- per annum clearly evidencing that not only he is involved in the day to day affairs as averred but also is a KMP and whole

time Director.

8. It is further argued that the present Petitioner in addition to being key managerial personnel at the relevant time is a whole time director drawing a

salary is a Director since 2005 as per the ROC company master data and his e-mail is the e-mail for the Company and is part and parcel of the

transaction at each step. It is further submitted that there are umpteen number of triable issues which can only be decided during the course of the

trial.

9. As far as the contention of the Petitioner regarding the locus of Respondent No. 2 to file the Complaint u/s 138 of the Act, it is submitted the payee

in the cheques is the wife of the complainant and she has duly authorized her husband to file the present complaint. Further the complainant has

submitted his affidavit in the Court to the effect that he is personally aware of all the facts and circumstances of the case. Counsel for the Respondent

No. 2 has relied upon:

a. A.C Narayan v. State of Maharashtra & Anr. Cr. Appeal No. 73 of 2007

b. Rajesh Agarwal v. State 2010 SCC Online Del 2501

c. Nandhini v. Vinayaga Textiles 2015 SCC Online Mad 8304

d. Monaben Ketanbhai Shah & Anr. v. State of Gujrat & Ors. (2004) 7 SCC 15

e. N. Rangachari v. BSNL (2007) 5 SCC 108

f. A. R. Radha Krishna v. Dasari Deepthi & Ors. (2019) 15 SSC 550

10. Now coming to the legal position in this case and taking into consideration the various provisions of Cr.P.C. which have been discussed in various

judgments time and again demonstrate that the Negotiable Instruments Act, provides sufficient opportunity to a person who issues the cheque. Once a

cheque is issued by a person, it must be honored 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 is bound to face the criminal trial and consequences. It is seen in many cases that the petitioners with malafide

intentions and to prolong the litigation raise false and frivolous pleas and in some cases, the petitioners do have genuine defence, but instead of

following due procedure of law, as provided under the N.I. Act and the Cr.P.C, and further, by misreading of the provisions, such parties consider that

the only option available to them is to approach the High Court and on this, the High Court is made to step into the shoes of the Metropolitan

Magistrate and examine their defence first and exonerate them. The High Court cannot usurp the powers of the Metropolitan Magistrate and entertain

a plea of an accused, as to why he should not be tried under Section 138 of the N.I. Act. This plea, as to why he should not be tried under Section 138

of the N.I. Act is to be raised by the accused before the Court of the Metropolitan Magistrate under Section 251 of the Cr.P.C. & under Section

263(g) of the Cr.P.C. Along with this plea, he can file necessary documents and

also make an application, if he is so advised, under Section 145(2) of the N.I. Act to recall the complainant to cross examine him on his plea of defense. 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.

11. An offence under Section 138 of the N.I. Act is technical in nature and defences, which an accused can take, are inbuilt; for instance, the cheque was given without consideration, the accused was not a 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 the Indian Evidence Act, 1872.

Since the mandate of the legislature is the 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 the N.I. Act and has to be read during the trial. The witnesses i.e. the complainant or other witnesses can be recalled only when the accused makes such an application and this application must disclose the reason why the accused wants to recall the witnesses and on what point the witnesses are to be cross examined.

12. The offence under Section 138 of the N.I. Act is an offence in the personal nature of the complainant and since it is within the special knowledge of the accused as to why he is not to face trial under section 138 N.I. Act, he alone has to take the plea of defense and the burden cannot be shifted to complainant. There is no presumption that even if an accused fails to bring out his defense, he is still to be considered innocent. If an accused has a defense against dishonor of the cheque in question, it is he alone who knows the defense and responsibility of spelling out this defense to the Court and then proving this defense is on the accused. Once the complainant has brought forward his case by giving his affidavit about the issuance of cheque, dishonor 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,

13. Sections 143 and 145 of the 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 defense evidence by way of affidavits and documents. Thus, an accused who considers that he has a tenable

defense 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 defense

evidence and if he is so advised, he can also file an application for recalling any of the witnesses for cross examination on the defense taken by him.

14. In view of the procedure prescribed under the Cr.P.C, if the accused appears after service of summons, the learned Metropolitan Magistrate shall

ask him to furnish bail bond to ensure his appearance during trial and ask him to take notice under Section 251 Cr.PC and enter his plea of defence

and fix the case for defence evidence, unless an application is made under Section 145(2) of N.I. Act for recalling a witness for cross-examination on

by an accused of defence. 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. Once the

summoning orders in all these cases have been issued, it is now the obligation of the accused to take notice under Section 251 of Cr.P.C., if not

already taken, and enter his/her plea of defence before the concerned Metropolitan Magistrate's Court and make an application, if they want to recall

any witness. If they intend to prove their defence without recalling any complainant witness or any other witnesses, they should do so before the Court

of Metropolitan Magistrate.

15. In the instant case the respondent no. 2/complainant in paragraph (3) and subsequent paragraphs of his complaint under Section 138 of N.I. Act

has made specific averments that while Accused Nos. 2 and 3 are directors of the company. He has specifically averred that accused persons were

personally known to him through common acquaintances and shared a cordial relationship which was the premise, on the basis of which the

complainant invested heavily in the funds of the company. The plea raised by the Ld. Counsel for the petitioner that Sumit Bhasin never participated in

any negotiations with the complainant cannot be considered at this preliminary stage since such defense can only be considered during the stage of

trial.

16. The prosecution under section 138 of the Act can be launched for vicarious

liability against any person, who at the time of commission of offence was in charge and responsible for the conduct of the business of the accused company. Merely because the petitioner did not sign the cheques in question, is not decisive for launching prosecution against him. The plea of the petitioner that the offences were committed without his knowledge cannot be considered at this stage considering the fact that the Complainant has specifically averred that negotiations had taken place with him along with other co-accused persons and they were prima facie aware about the whole series of transaction. After all, it was not small amount that was being invested and it was because of the parties being acquainted with each other that the whole transaction materialized. Reference can also be made to a decision in the case A. R. Radha Krishna (supra), wherein their Lordships observed that "the issue as to what was role That was played by the Director in the Company or a person in charge of is first ultimately a question of fact and no fixed formula can be fired for the same". In the cited case it was weighed in the mind of the court that accused persons were from same family and running the affairs of the accused company which is exactly the position in the instant case.

17. Further, prima facie it appears that even in the reply by the accused persons dated 27.08.2019, there was no specific denial about the role attributed to the accused Sumit Bhasin in the negotiations and transactions that were effected with the complainant. The deal with the complainant was not a trivial or a routine case of marketing, sale or purchase of goods or services. At the cost of repetition, when such a huge investment was being sought from the complainant and applied for the running of the affairs of the company, it is not fathomable that the accused persons were unaware of the financial implications for themselves and for the accused company.

18. Now, coming to the jurisdiction, suffice it to say that the Court, in exercise of its jurisdiction under Section 482 Cr.P.C. cannot go into the truth or otherwise of the allegations made in the complaint or delve into the disputed question of facts. The issues involving facts raised by the petitioner by way of defence can be canvassed only by way of evidence before the Trial Court and the same will have to be adjudicated on merits of the case and not by way of invoking jurisdiction under Section 482 Cr.P.C. at this stage.

19. Upon analyzing the provisions of the N.I. Act, it is clear that Section 138 of the Act spells out the ingredients of the offence as well as the conditions required to be fulfilled before initiating the prosecution.

20. These ingredients and conditions are to be satisfied mainly on the basis of documentary evidence, keeping in mind the presumptions under Sections 118 and 139 of the N.I. Act and Section 27 of the General Clauses Act, 1897 as well as the provisions of Section 146 of the Act.

21. The provisions of Sections 142 to 147 lay down a Special Code for the trial of offences under the Chapter XVII of the N.I. Act. While considering the scope and ambit of the amended provisions of the Act, the Supreme Court in *Mandvi Co Op Bank Ltd v. Nimesh B. Thakore*, AIR 2010 SC 1402, has held that the provisions of Sections 143, 144, 145 and 147 expressly depart from and override the provisions of the Cr.P.C, the main body of

adjective law for criminal trials. The Supreme Court has further held as under:-

“17. 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.

22. The parameters of the jurisdiction of the High Court in exercising jurisdiction under Section 482 Cr.P.C, are now almost well-settled. Although it

has wide amplitude, but a great deal of caution is also required in its exercise. The requirement is the application of well-known legal principles

involved in each and every matter. Adverting back the facts of the present case, this Court does not find any material on record which can be stated to

be of sterling and impeccable quality warranting invocation of the jurisdiction of this Court under Section 482 Cr.P.C. at this stage. More so, the

defence raised the petitioners in the petition requires evidence, which cannot be appreciated, evaluated or adjudged in the proceedings under Section

482 of Cr.P.C. and the same can only be proved in the Court of law. Reliance can be placed upon ""State of Madhya Pradesh Vs. Yogendra Singh

Jadon & Anr""., Criminal Appeal No. 175 of 2020 (Arising out of SLP (Criminal) No. 172 of 2017) decided by the Hon'ble Supreme Court on January

31, 2020 in which it has been held that "the power under Section 482 of the Code of Criminal Procedure, 1973 cannot be exercised where the

allegations are required to be proved in Court of law".

23. In the instant case, all these issues mentioned hereinabove involves disputed question of facts and law and cannot be decided unless and until the

parties go to trial and lead their respective evidence. Though invariably the initial phase of a litigation under Section 138 of the N.I. Act depends on

how well the pleadings or the allegations are laid down or articulated, by the complaint, in the ultimate analysis it is the trial that alone can bring out the

truth so as to arrive at a just and fair decision for the parties concerned.

24. Accordingly, I find no flaw or infirmity in the proceedings pending before the Trial Court. However, the Trial Court shall certainly consider and

deal with the contentions and the defense of the petitioner in accordance with law.

25. The prayers are untenable in law. Accordingly, the petition is dismissed and CRL.M.A. 1529/2021 is also disposed of accordingly.