

Court No. - 16

Case :- APPLICATION U/S 482 No. - 6694 of 2019

Applicant :- Bhagwati Sharana Dwivedi

Opposite Party :- State Of U.P. And Anr.

Counsel for Applicant :- Chandan Srivastava, Yogesh Somvanshi

Counsel for Opposite Party :- G.A., Anand Kumar Verma, Surya Prakash

Hon'ble Karunesh Singh Pawar, J.

1.The petition has been filed under Section 482 CrPC for quashing summoning order dated 2.12.2015 passed by Additional Chief Judicial Magistrate, Court No.2, Lakhimpur Kheri and order dated 15.5.2019 under sections 82 and 83 CrPC

2.Heard learned counsel for the petitioner, Mr. Surya Prakash, learned counsel for the complainant and Mr. Anurag Verma, learned A.G.A. for the State.

3.Learned counsel for the petitioner submits that a complaint under section 138 Negotiable Instruments Act (in short, Act) has been filed by the complainant and thereupon, after examination of the complainant under section 200 CrPC, the impugned summoning order has been passed. It is submitted that after amendment in the year 2005 in Section 202 CrPC, it is mandatory on the part of the Magistrate to conduct an enquiry under section 202 CrPC before issue of process, however, in spite of the fact that the accused resides beyond territorial jurisdiction of the court, it was not so done by the learned Magistrate while passing the impugned order of summoning.

4.Learned A.G.A. has opposed the contention and relying on the Constitution Bench judgment dated 16.4.2021 of Supreme Court in Suo Motu Writ

Petition (Cri) No.2 of 2020 In Re:Expeditious trial of cases under Section 138 of N.I. Act 1881 has submitted that there is no reason for insisting of the evidence of the witnesses to be taken on oath for the purpose of enquiry. Section 145 of the Act read with section 202 of the Code has been considered by the Supreme Court in the aforesaid judgment and it has been held that section 202 sub section (2) of the Code is inapplicable to the complaints under section 138 of the Act in respect of examination of witnesses on oath. It has been further held that evidence of witnesses on behalf of the complainant shall be permitted on affidavit. It is also held that if the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses and in appropriate cases, the Magistrate can examine documents for satisfaction as to the sufficiency of grounds for proceeding under section 202 (para 12 emphasised).

Mr. Verma has further relied on a judgment of Supreme Court in Mandvi Cooperative Bank Limited versus Nimesh B. Thakore (2010)3 SCC 83 (Relevant paras 20, 21, 24 and 25) and submits that the provisions of Sections 143, 144, 145 and 147 expressly depart from and override the provisions of the Code. The said provisions lay down a kind of a special code for the trial of offences under Chapter XVII of the Act and those sections were inserted in the Act by way of 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.

5.Learned counsel for the complainant has submitted that the statement of the complainant under section 200 CrPC along with an affidavit has been filed before the Court below and considering the said statement of the complainant, the impugned order has been passed.

6.A perusal of the record as also the judgment dated 16.4.2021 of Supreme Court shows that in order to settle the law due to divergence of opinion taken by various High Courts relating to the applicability of section 202 in respect of complaints filed under section 138 of the Act as in some cases, it has been held that it is mandatory for the Magistrate to conduct an inquiry as provided in section 202 of the Code before issuance of process in complaints filed under section 138 of the Act whereas contrary view has been expressed in some other cases, the Supreme Court in paras 11 and 12 has laid down the law regarding the subject.

The Supreme Court has also considered Section 145 of the Act which provides that evidence of the complainant may be given by him on affidavit, which shall be read in evidence in any inquiry, trial or other proceeding. Section 145 of the Act is extracted below :

"145. Evidence on affidavit.—

(1)Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2)The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."

It has been held that section 145 of the Act is an exception to Section 202 in respect of examination of the complainant by way of an affidavit. There is no specific provision in relation to examination of the witnesses also on affidavit in Section 145. Thus, it has been held that Section 145 had been inserted in the Act, with effect from the year 2003, with the laudable object of speeding up trials in complaints filed under section 138 of the Act. In case the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. Thus, the law has been summarised on a holistic reading of section 145 along with section 202 of the Code and it has been held that section 202(2) of the Code is inapplicable to complaints under section 138 in respect of examination of witnesses on oath. The evidence of witnesses on behalf of the complainant shall be permitted on affidavit. In case the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses. Relevant part of para 12 of the judgment is extracted below :

"12.....Section 145 of the Act is an exception to Section 202 in respect of examination of the complainant by way of an affidavit. There is no specific provision in relation to examination of the witnesses also on affidavit in Section 145. It becomes clear that Section 145 had been inserted in the Act, with effect from the year 2003, with the laudable object of speeding up trials in complaints filed under Section 138. If the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. On a holistic reading of Section 145 along with Section 202, we hold that Section 202 (2) of the Code is inapplicable to complaints under Section 138 in respect of 13 | P a g e examination of witnesses on oath. The evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses. In suitable cases, the Magistrate can examine documents for satisfaction as to the sufficiency of grounds for proceeding under Section 202.

7. Thus, in view of the aforesaid pronouncement

of the Supreme Court, argument of learned counsel for the petitioner that enquiry as contemplated under section 202 CrPC has not been conducted by the Magistrate as the witness has not been examined on oath by him loses its ground. Statement of the complainant under Section 202 CrPC has been filed which is an evidence in terms of section 145 of the Act. It is thus evident that Sub section (2) of Section 202 is inapplicable to the complaints under section 138 of the Act in respect of examination of witnesses on oath.

8. In the present case, the Magistrate while passing the impugned order has adverted to the complaint and the statement under section 200 of the Code. The complainant has filed his statement under section 200 CrPC, which has been considered by the Magistrate and passed the impugned order. Learned counsel for the complainant has produced before this Court copy of the affidavit of the complainant. There is no reason for insisting on the evidence of the witnesses to be taken on oath and section 202(2) shall not come in the way as held by the Supreme Court in the judgment referred to above which provides that Section 202(2) of the Code is inapplicable to complaints under section 138 in respect of examination of witnesses on oath. There is no bar to permit the evidence of witnesses on behalf of the complainant on affidavit. I find no reason to believe that the magistrate has not conducted enquiry to arrive at sufficient ground to proceed against the accused.

9. In view of what has been stated herein above, I do not find any merit in the petition. The petition being devoid of merit is dismissed.

The pending application, if any stands disposed of.

Order Date :- 19.2.2025
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