

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU
(through virtual mode)

Reserved on : 12.05.2021
Pronounced on : 17.05.2021

CRM(M) No.387/2020
CrIM Nos.1449/2020 & 1452/2020

Narinder Singh ...Petitioner(s)

Through:- Mr. Pankaj Dubey, Advocate

V/s

Sharjeel Malik ...Respondent(s)

Through:- Mr. Irfan Khan, Advocate

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. By invoking inherent powers vested in this Court in terms of Section 482 of the Code of Criminal Procedure, the petitioner seeks to quash order dated 20.08.2019 passed by the learned Judicial Magistrate 1st Class, Bhaderwah [‘the Trial Court’] in a complaint under Section 138 of Negotiable Instruments Act, 1881 [“the Act”] filed by the respondent against the petitioner, whereby the Trial Court, after recording preliminary statement of the complainant and his witnesses, has issued process to secure presence of the petitioner for facing the trial.

2. Briefly stated, the facts leading to the filing of instant petition are that the respondent has filed a complaint under Section 138

of the Act against the petitioner on the allegation that the petitioner had issued in his favour a cheque bearing No.005919 dated 17.07.2019 for an amount of Rs.25,00,000/- drawn on petitioner's account maintained with Ellaquai Dehati Bank, Branch Bhaderwah. The respondent deposited the said cheque for encashment in the bank on 17.07.2019 but the same was returned with the memo that account of the petitioner did not have sufficient funds for its encashment. The cheque was returned with the aforesaid memo by the bank on 17.07.2019. As is claimed, the respondent served a demand notice on the petitioner on 25.07.2019 requesting the petitioner to make the payment of the cheque amount within fifteen days from the date of receipt of the notice. The petitioner did not make the payment and, therefore, a complaint under Section 138 of the Act was filed before the Trial Court.

3. The complaint was entertained and taken cognizance of by the Trial Court, and preliminary statement of the complainant and his witnesses in support of the complaint was recorded. The Trial Court after considering the complaint and documents appended therewith as also the preliminary statement of the complainant and his witness, arrived at the satisfaction that there were sufficient grounds to proceed further in the matter. Accordingly, vide order impugned dated 20.08.2019, process was issued against the petitioner. It is this order of issuance of process, which is called in question by the petitioner in this petition primarily on two grounds:-

- i) that the complaint is not maintainable for the reason that in the complaint the respondent has not averred that he has

received the cheque in discharge of some legally enforceable debt or liability; and

- ii) That the complaint does not contain the list of witnesses.

It is, however, not the case of the petitioner that the complaint otherwise does not disclose commission of offence under Section 138 of the Act and, therefore, should not have been entertained by the Trial Court.

4. Having heard learned counsel for the parties and perused the record, I am of the view that the impugned order of issuance of process to the petitioner does not suffer from any illegality or infirmity as would call for any interference by this Court in exercise of its inherent jurisdiction under Section 482 Cr.P.C.

5. It true that in the complaint the respondent has not disclosed the legally enforceable debt or liability in discharge whereof he has received the cheque from the petitioner. That, however, cannot vitiate the complaint for the simple reason that under Section 139 of the Act, there is presumption that holder of the cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability unless of course the contrary is proved.

6. In view of the provision of Section 139 of the Act, it is not available to the petitioner to argue that in the absence of specific mention in the complaint that the cheque was received by the respondent in the discharge of any debt or other liability, the complaint is not maintainable.

7. The view of mine finds support from the judgment of Hon'ble Supreme Court in **Rohitbhai Jivan Lal Patel v. State of**

Gujrat, (2019) 18 SCC 106. What is held by the Supreme Court in paras 14 and 15 is quite apposite and is, thus, reproduced hereunder:-

“14. We may usefully take note of the provisions contained in [Sections 118](#) and [139](#), being the special rules of evidence applicable to the case as follows:

"118. Presumption as to negotiable instruments.----- Until the contrary is proved, the following presumptions shall be made:--

(a) of consideration-----that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date---that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance-----that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer----that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements----that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps--- that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course----that the holder of a negotiable instrument is a holder in due course;

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence of fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him."

"139. Presumption in favour of holder ---- It shall be presumed, unless the contrary is proved, that the holder is a cheque received the cheque of the nature referred to in [section 138](#) for the discharge, in whole or in part, if any debt or other liability."

15. So far the question of existence of basic ingredients for drawing of presumption under [Sections 118](#) and [139](#) the NI Act is concerned, apparent it is that the accused-appellant could not deny his signature on the cheques in question that had been drawn in favour of the complainant on a bank account maintained by the accused for a sum of Rs. 3 lakhs each. The said cheques were presented to the Bank concerned within the period of their validity and were returned unpaid for the reason of either the balance being insufficient or the account being closed. All the basic ingredients of [Section 138](#) as also of [Sections 118](#) and [139](#) are apparent on the face of the record. The Trial Court had also consciously taken note of these facts and had drawn the requisite presumption. Therefore, it is required to be presumed that the cheques in question were drawn for consideration and the holder of the cheques i.e., the complainant received the same in discharge of an existing debt. The onus, therefore, shifts on the accused-appellant to establish a probable defence so as to rebut such a presumption."

8. Equally untenable is the argument of the learned counsel for the petitioner that the complaint in the absence of list of witnesses submitted alongwith the complaint, is not maintainable. It is true that under Section 204 of the Code of Criminal Procedure, the Court shall not issue summon or warrant against the accused unless list of prosecution witnesses is filed. However, the defect of not supplying the list of prosecution witnesses is only an irregularity and the same would not vitiate the proceedings unless failure of justice has in fact been occasioned thereby. No prejudice has been pleaded by the petitioner in this petition.

9. In the view I have taken, I am fortified by a Full Bench judgment of this Court rendered in the case of **Abdullah Bhat v. Ghulam Mohd., 1972 CriLJ 277**. Paras 6 and 7 of the judgment are apposite and are therefore, reproduced hereunder:-

“6. Reverting to Section 204 (1-A) it is clear to us that the object of this provision is not to introduce a requirement that goes to the root of the jurisdiction, as for example, the requirement of previous sanction under Section 197, but to serve a two-fold purpose; one to apprise the accused at the earliest opportunity of the persons who are likely to give evidence against him and second, to scuttle any attempt on the part of the complainant subsequently to improve the state of evidence by made-up witnesses. This may give a valuable right to the accused but it is not certainly one which the law regards as fundamental or sacred in that the list of witnesses, as aforesaid, may be added to, modified, or

otherwise varied in the subsequent proceedings under Section 208 if the offence is one triable by a Court of Session or at the trial under Section 252 if the case is a warrant case and under Section 244. if the case is a summons case, the reason being that in all these sections the law provides that the Magistrate shall take "all such evidence" as the complainant may produce implying that he shall not be tied down to the list of witnesses already furnished by him with the complaint. Again the provision is analogous to Section 173 (4) which provides that in cases instituted upon police report as distinguished from 'complaint' the investigating officer shall be under an obligation to supply, before the commencement of the enquiry, to the accused not only the list of persons proposed to be examined by the prosecution but also copies of their statements recorded under Section 161 as also copies of other documents or relevant extract therefrom which the prosecution proposes to rely upon. The trend of the decisions of the Supreme Court as reflected in and is that non-supply of such copies is not a matter affecting the jurisdiction of the court but it may vitiate the trial depending on whether or not prejudice was caused to the accused. In this, the court relied upon the provisions of [Section 537](#) of the Code of Criminal Procedure which provide amongst other things that subject to the provisions contained in [the Code](#) no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, or judgment or other proceedings before or during the trial or in any inquiry or other proceedings under [the Code](#) unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice. In our opinion, the omission to file a list

of witnesses along with the complaint should not have a more far reaching effect than the omission to carry out the provisions of [Section 173\(4\)](#). In every such case therefore, the guiding principle should be if any prejudice was caused to the accused. This is a question of fact which will hinge on the facts and circumstances of each case.

7. For these reasons we are not inclined to agree with the view that the provisions of [Section 204](#) (1-A) are mandatory in the sense that a process issued on a complaint before the filing of the list of witnesses would be invalid or invalidate the subsequent proceedings which is the view taken in . and also by this Court in case, H. Ghulam Mohd. Barza v. Hazra Begum decided on 31-10-1969, and also seems to be the view implied in the case. Nor are we prepared to simplify the matter as was done in where it was said that [Section 204](#) (1-A) imposes a condition on the issue of summons against the accused and once a summons is issued it ceases to be of any relevance and does not govern the subsequent procedure. On the other hand we would say that the breach of the provisions of [Section 204](#) (1-A) is not a matter going to the root of the jurisdiction but only a curable irregularity under [Section 537](#) Cr. P. C. in which prejudice should be the balancing factor.”

10. In the instant case, the petitioner is yet to cause appearance in the case and before the respondent embarks upon recording of his evidence he can very well file the list of witnesses and cure the defect.

11. In that view of the matter, the defect of not supplying the list of prosecution witnesses before issuance of process is curable, as Section 465 Cr.P.C. would come to the rescue of the respondent. The Court can

very well permit the respondent to submit the list of prosecution witnesses before proceeding further in the complaint.

12. For the foregoing reasons, I find no merit in this petition.

The same is, accordingly, dismissed.

(Sanjeev Kumar)
Judge

Jammu
17.05.2021
Vinod.

Whether the order is speaking: Yes
Whether the order is reportable : Yes