* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment Reserved on: 3rd November, 2023***
Judgment Delivered on: 10th November, 2023

\+ **CRL.M.C. 2480/2023, CRL.M.A. 9435/2023 (stay)**

NORTHERN INDIA PAINT COLOUR
AND VARNISH CO. LLP ..... Petitioner

Through: Mr. Kotla Harshavardhan, Ms.Mansi Sood, Ms. Rishbha Arora and Mr. Divyank Yadav, Advocates.

versus

SUSHIL CHAUDHARY ..... Respondent

Through: Mr. Viraj Datar, Senior Advocate with Mr.Atul T.N. and Ms. K. Pallavi, Advocates.

\+ **CRL.M.C. 4141/2023, CRL.M.A. 15544/2023 (stay)**

MR. SUSHIL CHAUDHARY ..... Petitioner

Through: Mr.Viraj Datar, Senior Advocate with Mr.Atul T.N. and Ms. K. Pallavi, Advocates.

versus

THRIVING FARM BUILDERS PVT LTD. ..... Respondent

Through: Mr. Kotla Harshavardhan, Ms. Mansi Sood, Ms. Rishbha Arora and Mr. Divyank Yadav, Advocates.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

1. Both the present petitions raise similar issues and hence are being taken up together for disposal.

2. CRL.M.C.2480/2023 has been filed by the petitioner/complainant Northern India Paint Colour and Varnish Co. LLP (hereinafter "Complainant") impugning the order dated 15th February, 2023 passed by the learned Additional Sessions Judge (ASJ), Tis Hazari Courts, Delhi, whereby the summoning order dated 9th January, 2020 passed by the Metropolitan Magistrate (MM), Central, Tis Hazari Courts, Delhi, in a complaint case under Section 138 of the Negotiable Instruments Act, 1881 (NI Act) being CC No. 380/2020 has been set aside and remanded the matter back to the learned MM for fresh consideration. The relevant observations from the impugned order are set out below:

> *"6. In this case, admittedly, the accused is residing beyond the territorial jurisdiction of the ld. Trial Court. Therefore, the ld. Trial Court, ought to have conducted an inquiry u/s. 202 CrPC before arriving at a conclusion that there is sufficient ground to proceed against the accused.* ***However, in the instant case, the said inquiry was not conducted. In absence of the said mandatory inquiry, the impugned order of summoning of the petitioner cannot be legally sustained. Hence, the impugned order is hereby set aside****.*
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> *7. The present case is remanded back with directions to the Ld. Trial Court to conduct the mandatory inquiry u/s.202 CrPC for ascertaining whether all the ingredients of the offence punishable u/s.138 NI Act including issuance of the cheque in question by the petitioner in discharge of his lawful liability are satisfied or not.* ***In the said inquiry, the ld. Trial Court shall properly appreciate the Share Sale and Purchase Agreement dated 27.09.2019 between the parties to ascertain if the amount of the cheque in question has become lawfully due and payable by the petitioner to the respondent towards the sale price of the shares and whether pre-requisites for the transfer of the said shares, as contained in the said agreement, have been complied by the respective parties****."*

3. CRL.M.C.4141/2023 has been filed by the petitioner/accused Sushil Chaudhary (hereinafter "Accused"), seeking quashing of the order dated 27th January, 2020 passed by the learned MM, whereby the Accused has been summoned in CC No.886/2020 filed by the Complainant under Section 138 of the NI Act on the ground that the mandatory inquiry under Section 202 of the Code of Criminal Procedure, 1973 (CrPC) has not been conducted by the learned MM.

4. Both sides have filed brief written note of submissions in support of their submissions.

5. Counsel for the Complainant submits that the mandatory inquiry in terms of Section 202 of the CrPC was duly conducted by the learned MM in both the complaint cases. For the purpose of the said inquiry, it is not necessary for the learned MM to examine witnesses and the said inquiry can be conducted on the basis of pre summoning evidence and the documents on record. Further, it is not mandatory for the learned MM to formally mention Section 202 of the CrPC in the summoning order, if otherwise it is clear that the inquiry under the aforesaid section has been duly conducted. Reliance in this regard has been placed on ***Re: Expeditious Trial of Cases Under Section 138 of NI Act 1881***, 2021 SCC OnLine SC 325.

6. It is further submitted that in view of the presumption contained under Section 139 of the NI Act, the learned MM was not required to ascertain the existence of a legally enforceable debt prior to the issuance of summons as that is a matter of trial. In this regard, reliance has been placed on the judgment of ***Shiv Kumar* v. *Ramavtar Agarwal***, (2020) 12 SCC 500.

7. *Per contra*, senior counsel appearing on behalf of the Accused submits that the learned MM has failed to conduct the mandatory inquiry

under Section 202 of the CrPC and the summoning orders have been passed mechanically without ascertaining whether any legally enforceable debt exists or not. In the present case, since the debt arises from the Agreement for the Sale and Purchase of Shares (hereinafter "Agreement") dated 1st October, 2019, it was incumbent upon the learned MM to refer to the relevant clauses of the said agreement to determine the existence of a legally enforceable debt. In this regard, reliance is placed on the following judgments:

i. ***Pepsi Foods Ltd.* v. *Judicial Magistrate***, (1998) 5 SCC 749,

ii. ***Dashrathbhai Trikambhai Patel* v. *Hitesh Mahendrabhai Patel,*** (2023) 1 SCC 578.

8. I have heard the counsels for the parties and perused the material on record.

9. At the outset, reference may be made to Section 202 of the CrPC:

> *"202. Postponement of issue of process.—(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:*
> *Provided that no such direction for investigation shall be made,—*
> *(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or*

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath*:*
Provided…"

10. Reference may also be made to Section 145 of the NI Act:

"*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."

11. In ***Re: Expeditious Trial of Cases under Section 138 of the NI Act 1881*** (supra), the Supreme Court has laid down guidelines with regard to expeditious trial in cases of Section 138 of the NI Act. The guidelines in respect of inquiry under Section 202 of the CrPC read with Section 145 of the NI Act, which are relevant for the purposes of the present dispute are set out below:

"*11. The learned Amici Curiae referred to a judgment of this Court in K.S. Joseph v. Philips Carbon Black Ltd.4 where there was a discussion about the requirement of inquiry under Section 202 of the Code in relation to complaints filed under Section 138 but the question of law was left open.* ***In view of the judgments of this Court in Vijay Dhanuka (supra), Abhijit Pawar (supra) and Birla Corporation (supra), the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot***

be dispensed with. The learned Amici Curiae recommended that the Magistrate should come to a conclusion after holding an inquiry that there are sufficient grounds to proceed against the accused. We are in agreement with the learned Amici.

Another point that has been brought to our notice relates to the interpretation of Section 202 (2) which stipulates that the Magistrate shall take evidence of the witness on oath in an inquiry conducted under Section 202 (1) for the purpose of issuance of process. Section 145 of the Act provides that the evidence of the complainant may be given by him on affidavit, which shall be read in evidence in any inquiry, trial or other proceeding, notwithstanding anything contained in the Code. Section 145 (2) of the Act enables the court to summon and examine any person giving evidence on affidavit as to the facts contained therein, on an application of the prosecution or the accused. It is contended by the learned Amici Curiae that though there is no specific provision permitting the examination of witnesses on affidavit, Section 145 permits the complainant to be examined by way of an affidavit for the purpose of inquiry under Section 202. He suggested that Section 202 (2) should be read along with Section 145 and in respect of complaints under Section 138, the examination of witnesses also should be permitted on affidavit. Only in exceptional cases, the Magistrate may examine the witnesses personally. 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 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. From the observations extracted above, it becomes abundantly clear that in cases of 138 NI Act, the evidence of witnesses of the complainant can be on the basis of affidavit. Further the Magistrate may not insist on the evidence of the witnesses to be taken on oath****. The Supreme Court also takes note of the fact that the object of Section 145 NI Act is to speed up the trial in complaints under Section 138 of the NI Act.*"

12. In light of the aforesaid guidelines, High Courts were requested to issue practice directions to the Trial Courts, *inter alia*, on the aspect of conduct of inquiry under Section 202 of the CrPC. The relevant extracts of the Practice Directions issued by this Court on 21st June, 2021, insofar as they pertain to conducting an inquiry under Section 202 of the CrPC are set out below:

> *"2. On receipt of any such complaint under Section 138 of N.I. Act, wherever it is found that any accused is resident of the area beyond the territorial jurisdiction of the Magistrate concerned, an inquiry shall be conducted by the Magistrate to arrive at sufficient grounds to proceed against the accused as prescribed under Section 202 Cr.P.C.*
> *3.* ***While conducting any such inquiry under Section 202 Cr.P.C., the evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate may restrict the inquiry to examination of documents for satisfaction as to the sufficiency of grounds for proceeding under the said provision****."*

13. Based on the above, it is clear that in cases under Section 138 of the NI Act, the mandatory inquiry as contemplated by Section 202 of the CrPC can be conducted by taking evidence of the complainant on affidavit. The

inquiry need not be necessarily conducted by taking evidence on oath. Further, documents may be examined by the Trial Court for satisfaction as to the sufficiency of grounds for proceeding under Section 202 of the CrPC.

14. In light of the aforesaid legal position, it has to be determined whether the learned MM in the present cases has conducted an inquiry under Section 202 of the CrPC before issuance of summons to the Accused.

15. At this stage, reference may be made to the summoning orders passed by the learned MM in both the subject complaints. The summoning order in CC No.380/2020 in CRL.M.C. 2480/2023 is set out below:

> "*Pre-summoning Complainant's Evidence recorded. Documents exhibited. Arguments heard on the summoning aspect.*
>
> ***This Court has perused the record of the case file. The accused has issued a cheque in favour of the complainant towards discharge of his liability which was returned unpaid as dishonoured vide cheque return memo. Thereafter, the legal notice of demand was issued by the complainant. However, the accused has failed to pay the cheque amount within 15 days of the receipt of the aforesaid legal notice. Hence, the present complaint has been filed****.*
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> ***There is sufficient material available on record to summon the accused. Therefore, a prima-facie case punishable u/s 138 Negotiable Instruments Act, 1881 is made out against the accused****. This Court, therefore, takes cognizance of offence u/s 138 Negotiable Instruments Act, 1881.*
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> *Issue summons on the accused on filing of PF&RC/speed post as well as through all permissible modes for 19.05.2020...*"

16. The summoning order in CC No. 886/2020 in CRL.M.C.4141/2023 is set out below:

> "*Pre-summoning evidence by way of affidavit has been*

tendered along with documents which have been duly exhibited. Vide separate statement, pre-summoning evidence of the complainant is closed.

Arguments Heard. Record perused.

I have gone through the complaint, list of dates & events, evidence and the documents placed on record. The legal notice was issued within the prescribed period and the complaint has also been filed within limitation period as per the inquiry made u/s 202 CrPC.

In view of the above, ***I am prima facie satisfied that an offence under Section 138 of Negotiable Instruments Act against the accused has been made out within my jurisdiction.***

Let the accused be summoned on filing of PF, only by way of RC-AD/Speed Post/Courier Services as approved by the Hon'ble High Court and tracking report be filed on 01.06.2020. PF be filed within reasonable time."

17. Senior counsel appearing on behalf of the Accused vehemently contends that the learned MM has not made any reference to the Agreement, in terms of which the legally enforceable debt had allegedly arisen in favour of the complaint. It is submitted that a perusal of the said Agreement would have shown that in the present cases, there is no legally enforceable debt that has accrued in favour of the Complainant.

18. I am unable to accept the aforesaid submission made on behalf of the Accused. Whether the conditions as contemplated in the Agreement for a legally enforceable debt to accrue have arisen or not cannot be determined simply by perusal of the Agreement. It is the contention of the Complainant that the conditions in the Agreement have been satisfied and therefore, there is a legally enforceable debt, whereas the Accused contends that the same have not been satisfied and there arises no legally enforceable debt.

19. In light of the presumption under Section 139 of the NI Act, a cheque

given under Section 138 of the NI Act is presumed to be in discharge of a legally enforceable debt or other liability. The aforesaid presumption is rebuttable and the accused can rebut this presumption by leading evidence in this regard. Therefore, the contention of the Accused that a legally enforceable debt has not accrued in favour of the Complainant on account of non-fulfilment of the conditions in the Agreement would have to be proved by leading evidence at the time of trial. The learned MM is not required to go into this evidence while conducting an inquiry under Section 202 of the CrPC.

20. At the stage of issuance of summons, for the purpose of Section 202 of the CrPC read with section 145 of the NI Act, the learned MM is only required to examine whether the basic ingredients of an offence under Section 138 of the NI Act have been *prima facie* made out by the complainant and supported by the pre-summoning evidence led on behalf of the complainant.

21. In both the present cases, the complaints disclose a debt. The learned MM on the basis of the complaints and the pre-summoning evidence led on behalf of the Complainant has observed that; a cheque was issued by the Accused to the Complainant; and the aforesaid cheque was dishonoured. Further, upon dishonour, statutory notice under Section 138 of the NI Act had been duly issued by the Complainant to the Accused and the Accused failed to make the payment within fifteen days of the receipt of the notice. In my considered view, both the summoning orders issued by the learned MM in the present cases satisfy the requirements of Section 202 of the CrPC read with Section 145 of the NI Act.

22. In this regard, reference may be made to the judgment of the Supreme

Court in ***Shiv Kumar*** (supra), where a similar submission raised on behalf of the accused persons was negated by the Supreme Court. The relevant observations are set out below:

> *"4. Mr Mahesh Jethmalani, learned Senior Counsel appearing for the appellant contends that the Judicial Magistrate First Class could have examined the materials filed along with the complaint and from the materials which were brought on the record it was clear that there was no legally enforceable debt, hence there was no case for taking cognizance of the offence and registering the criminal complaint. He referred to the agreement dated 21-10-2014 Annexure P-2 between the parties. The learned counsel for the appellant has also referred to the judgment of the High Court and specifically paras 23 and 32. The High Court in paras 23 and 32, which has been relied and referred to by the counsel for the appellant, observed: (Shiv Kumar case [Shiv Kumar v. Ramavtar Agrawal, 2016 SCC OnLine Chh 2121] , SCC OnLine Chh)*
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> > *"23.* ***The presumption available under Section 139 of the NI Act has to be rebutted and that rebuttal can only be done after adducing evidence.*** *This, by itself clearly reflects that the rebuttal presumption cannot be looked into at the stage of the Court taking cognizance of the offence and registering the case: all that Court would have to see is whether there is a prima facie case made out meeting the conditions precedent as envisaged under Section 138 of the NI Act, which in the instant case, in the opinion of this Court, the respondent has in fact been able to establish and fulfil all such ingredients.*
> >
> > *xxx xxx xxx*
> >
> > *"32.* ***As has been stated in the preceding paragraphs since there is a presumption to be drawn of there being a debt or liability in part or in whole of the drawer to the holder of the instrument, the court below cannot be said to have faulted upon in taking cognizance and in registering the offence.***

> *Since it is a rebuttable presumption and all the contentions and averments made by the counsel for the petitioner being his defence, it would be open for him to raise all these grounds at the stage of leading evidence including the defence of existence of legally enforceable debt or liability.* ***However, there can be no doubt that at the time of filing of complaint there was always initial presumption which would be in favour of the complainant****."*
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> ***We are in full agreement with the opinion of the High Court expressed in the above noted paragraphs which has been referred by the learned counsel for the appellant. It is well settled that the rebuttal can be made with reference to the evidence of the prosecution as well as of defence***."

23. The aforesaid observations of the Supreme Court are fully applicable in the present case.

24. Further, it cannot be accepted that just because the summoning order of the MM does not make specific reference to Section 202 of the CrPC, that an inquiry as contemplated in the aforesaid provision has not been conducted by the learned MM.

25. In view of the discussion above, I am of the considered view that in both the complaint cases, the learned MM has duly conducted the necessary inquiry under Section 202 of the CrPC before issuance of summons to the Accused.

26. If the contention of the Accused is accepted that the MM has to conduct an inquiry by appreciating the terms and conditions of the Agreement entered into between the parties to ascertain if a legally enforceable debt has arisen, it would result in a full trial being conducted even before the issuance of summons. Clearly, such an exercise would be in teeth of the directions passed by the Supreme Court in ***Re: Expeditious***

Trial of Cases Under Section 138 of NI Act 1881 (supra).

27. Reliance placed on behalf of the Accused on ***Dashrathbhai Trikambhai Patel*** (supra) is misplaced as the aforesaid judgment was not in the context of Section 202 of the CrPC but upon the ingredients to be satisfied for an offence under Section 138 of the NI Act to be made out during a full-fledged trial. Further, reliance placed on ***Pepsi Foods Ltd.*** (supra) is also of not much help to the Accused, as this Court is of the opinion that the learned MM has applied his judicial mind while issuing summons in the present cases.

28. Accordingly, CRL.M.C.2480/2023 is allowed and the order dated 15th February, 2023 passed by the learned ASJ is set aside and the order dated 9th January, 2020 passed by the learned MM is upheld. CRL.M.C.4141/2023 stands dismissed and the order dated 27th January, 2020 passed by the learned MM is upheld.

29. The present petitions, along with the pending applications, stand disposed of.

AMIT BANSAL, J.

NOVEMBER 10, 2023
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