

HIGH COURT OF PUNJAB AND HARYANA
Bench: JUSTICE HARPREET SINGH BRAR
Date of decision: 19.01.2024

CRM-M-18840-2020

LALIT MOHAN MEHTA AND OTHERS ...Petitioners

VS

STATE OF PUNJAB AND ANOTHERRespondents

CRM-M-21262-2020

DARSHAN DHRUPADLAL MAJUMDAR ...Petitioners

VS

STATE OF PUNJAB AND ANOTHERRespondents

CRM-M-21575-2020

LALIT MOHAN MEHTA AND OTHERS

... Petitioners

V/S

STATE OF PUNJAB AND ANOTHER

... Respondents

CRM-M-21710-2020

LALIT MOHAN MEHTA AND OTHERS

...Petitioners

V/S

STATE OF PUNJAB AND ANOTHER

....Respondents

CRM-M-23366-2020

DARSHAN DHRUPADLAL MAJUMDAR

... Petitioner

V/S

STATE OF PUNJAB AND ANOTHER

... Respondents

CRM-M-25017-2020

DARSHAN DHRUPADLAL MAJUMDAR

... Petitioner

V/S

VIVEK GUPTA AND ANOTHER

... Respondents

CRM-M-28741-2020

DARSHAN DHRUPADLAL MAJUMDAR

... Petitioner

V/S

VIVEK GUPTA AND ANOTHER

... Respondents

CRM-M-34176-2021

LALIT MOHAN MEHTA AND OTHERS

...Petitioners

V/S

STATE OF PUNJAB AND ANOTHER

....Respondents

CRM-M-34568-2021

DARSHAN DHRUPADLAL MAJUMDAR

... Petitioner

V/S

STATE OF PUNJAB AND ANOTHER

... Respondents

CRM-M-34550-2021

LALIT MOHAN MEHTA AND OTHERS

... Petitioners

V/S

STATE OF PUNJAB AND ANOTHER

... Respondents

CRM-M-34569-2021

DARSHAN DHRUPADLAL MAJUMDAR

... Petitioner

V/S

STATE OF PUNJAB AND ANOTHER

... Respondents

CRM-M-35575-2020

RAKESH KUMAR KULDIP SINGH WADHWAN AND ANOTHER

...Petitioners

V/S

VIVEK GUPTA AND ANOTHER

....Respondents

CRM-M-35921-2021

RAKESH KUMAR KULDIP SINGH WADHWAN AND ANOTHER

... Petitioners

V/S

VIVEK GUPTA AND ANOTHER

... Respondents

CRM-M-35992-2021

RAKESH KUMAR KULDIP SINGH WADHWAN AND ANOTHER

... Petitioners

V/S

VIVEK GUPTA AND ANOTHER

... Respondents

CRM-M-42198-2020

RAKESH KUMAR KULDIP SINGH WADHWAN AND ANOTHER

... Petitioners

V/S

VIVEK GUPTA AND ANOTHER

... Respondents

CRM-M-4381-2021

RAKESH KUMAR KULDIP SINGH WADHWAN AND ANOTHER

... Petitioners

V/S

VIVEK GUPTA AND ANOTHER

... Respondents

CRM-M-4499-2021

RAKESH KUMAR KULDIP SINGH WADHWAN AND ANOTHER

...Petitioners

V/S

VIVEK GUPTA AND ANOTHER

... Respondents

Legislation and Rules:

Section 482 of the Code of Criminal Procedure (Cr.P.C.)

Section 138 of the Negotiable Instruments Act, 1881 (NI Act)

Section 202 of the Cr.P.C.

Subject: Quashing of summoning orders concerning dishonoured cheques under Section 138 of the NI Act, involving directors of HDIL, and remanding the matter for fresh consideration following the procedure under Section 202 of Cr.P.C.

Headnotes:

Quashing of Summoning Order - Non-Executive Independent Directors - The petitioners, being Non-Executive Independent Directors of HDIL, challenged the summoning orders issued against them in relation to dishonoured cheques. The court observed the necessity of proving the day-to-day involvement of these directors in the company's affairs for holding them liable under Section 138 of the NI Act. [Paras 3, 4]

Procedural Lapse in Summoning Process - The court noted the failure to follow the mandatory drill of Section 202 of the Cr.P.C. before issuing summoning orders against petitioners residing outside the local jurisdiction of the trial court. The court highlighted the importance of this procedural requirement, especially in the context of senior citizens and non-resident accused. [Paras 5, 9, 10, 11]

Corporate Insolvency and Liability - The petitioners argued that due to corporate insolvency proceedings initiated against HDIL, the directors were not liable for the dishonoured cheques. However, the respondent emphasized that the insolvency proceedings did not absolve the petitioners of their responsibilities under the NI Act. [Paras 4, 7]

Remand for Fresh Consideration - The court set aside the summoning orders and remanded the matter back to the Judicial Magistrate for fresh consideration in accordance with Section 202 of the Cr.P.C. The court refrained from commenting on the merits of the case to prevent any prejudice during the trial. [Paras 12, 13, 14]

Referred Cases:

- SMS Pharmaceuticals Ltd v. Neeta Bhalla (2005) 8 SCC 89
- Girdhari Lal Gupta v. D.H. Mehta and another (1973) 3 SCC 189
- Chintalapati Srinivasa Raju v. SEBI (2018) 7 SCC 443
- P. Mohanraj v. M/s Shah Brothers Ispat Pvt. Ltd. 2021(2) R.C.R.(Criminal) 711
- HMT Watches Limited vs M.A. Abida (2015) 11 SCC 776
- Abhijit Pawar vs. Hemant Madhukar 2017(3) SCC 528
- National Bank of Oman vs. Barakara Abdul Aziz and another 2013(2) SCC 488
- Dr. Jasminder Kaur vs. Raj Karan Singh Boparai CRM-M-20260-2008

Representing Advocates:

Mr. Anand Chibber, Senior Advocate with Ms. Mannat Anand for Petitioners in CRM-M Nos.35575, 42198 of 2020, and CRM-M Nos.35921, 35992, 4381, 4499 of 2021

Mr. Pritam Singh Saini and Mr. Lovejeet Poonia for Petitioners in CRM-M Nos.21262, 25017, 23366, 28741 of 2020, and CRM-M Nos.34568, 34569 of 2021

Mr. Naveen S. Bhardwaj for Petitioners in CRM-M Nos.18840, 21487, 21575, 21710, 34176 of 2020, and 34550 of 2021

Mr. Subhash Godara, DAG Punjab

HARPREET SINGH BRAR J. (ORAL)

1. This common order of mine shall dispose of the above-mentioned petitions as they arise out of the same factual matrix and common question of law is involved. For the sake of brevity, the facts are taken from CRM-M18840-2020.

2. The petitioners have approached this Court by filing present petition under Section 482 of the Code of Criminal Procedure (hereinafter 'Cr.P.C.') seeking quashing of summoning order dated 25.11.2019 (Annexure P-4) passed by learned Judicial Magistrate 1st Class, Ludhiana along with the complaint bearing no. COMA/30705 dated 23.11.2019 titled as '*Vivek Gupta v. M/s Housing Development Infrastructure Limited and others*' filed under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter 'NI Act')

FACTUAL BACKGROUND

2. The complainant-respondent Vivek Gupta booked Flat No. 1807, D Wing, 18th floor in Majestic Towers, Mumbai vide agreement to sell dated 14.05.2014 with the accused company-M/s Housing Development and Infrastructure Limited (hereinafter 'HDIL'). However, HDIL failed to give possession of the said flat and a settlement was arrived at on 24.07.2019 whereby, the accused agreed to return the principal amount of Rs. 75,43,773/- along with an interest of Rs. 58,13,185. To discharge the said liability five cheques for Rs. 22,25,826/- and one cheque of Rs. 16,44,510/- (after deducting

TDS) were issued to the complainant by the company, duly signed by Managing Director Sarang Ramesh Wadhwan. The first cheque was dated 10.10.2019 and the others were staggered by one month gaps. In the instant case, cheque no. 151385 dated 10.10.2019 for Rs. 22,25,826/- was dishonoured on presentation vide memo dated 11.10.2010 with the remarks- 'payment stopped by the drawer.' Subsequently, legal notice dated 22.10.2019 was served on the accused. However, the accused failed to make the requisite payment and the instant criminal complaint under Section 138 of the NI Act was filed against HDIL, Co-Managing Directors- Rakesh Kumar Kuldip Singh Wadhwan and Sarang Rakesh Wadhwan, Company Secretary- Darshan Dhruvad Majumdar and Non-Executive Independent Directors, petitioners in the instant case- Lalit Mohan Mehta, Raj Kumar Aggarwal, Hazari Lal and Sandhya Baliga. Similar complaints were filed corresponding to the other five cheques issued by the accused company being dishonoured, as tabulated below:

Sr. No.	Complaint No.	Cheque No.	Cheque amount
1.	COMA/31853 dt. 8.12.2019	151386 dt. 10.11.2019	Rs. 22,25,826/-

2.	COMA/972 dt.18.01.2020		151387 10.12.2019	dt.	Rs. 22,25,826/-
3.	COMA/2105 13.02.2020	dt.	151388 10.01.2020	dt.	Rs. 22,25,826/-
4.	COMA/6370 13.07.2020	dt.	151389 10.02.2020	dt.	Rs. 22,25,826/-
5.	COMA/6374 13.07.2020	dt.	151264 10.03.2020	dt.	Rs. 16,44,510/-

CONTENTIONS

3. Learned counsel for the petitioner submits that the learned trial Court has fallen into error by passing summoning order dated 25.11.2019 (Annexure P-4) against petitioner no. 1, 3 and 4 as they are Non-Executive Independent Directors of the HDIL and as such, did not participate in everyday business of the accused company. He places reliance on the judgment of the Hon'ble Supreme Court in **SMS Pharmaceuticals Ltd v. Neeta Bhalla (2005) 8 SCC 89** to argue that in order to hold a person vicariously liable, it is necessary to show that he was in-charge and responsible for conduct of business. He further places reliance on the judgment of the Hon'ble Supreme Court in **Girdhari Lal Gupta v. D.H. Mehta and another (1973) 3 SCC 189** to argue that person in-charge would mean such a person is overall in day to day business of the company. Further, reliance was placed on **Chintalapati Srinivasa Raju v. SEBI (2018) 7 SCC 443** to argue that Non-Executive Directors who are not involved in day to day affairs are not responsible for conduct of business of the company. None of the petitioners had signed the disputed cheque, in fact they had resigned before the cheques were presented for encashment.

4. Learned counsel for the petitioners further argues that Bank of India sought corporate insolvency of HDIL. The moratorium period was effected from 20.08.2019 and Mr. Abhay Narayan was appointed as Interim Resolution Professional(IRP). Subsequently, public announcement was made by IRP to home buyers to submit their claim on or before 08.09.2019. The claim of the complainant for Rs. 1,16,39,058.14/- (Rs. 75,68,303/- as principal amount and Rs. 40,70,663/- as interest) was accepted by the IRP. As such, the company or its directors are not liable for the dishonouring of the cheque.

5. Lastly, learned counsel for petitioners submits that none of the petitioners reside in the local jurisdiction of the learned trial Court and in fact,

most of them reside in Mumbai. Moreover, petitioner no. 2- Raj Kumar Aggarwal has died and petitioner no. 1, 3 and 4 are senior citizens. He further submits that the trial Court has erred in passing the impugned order dated 23.11.2019 (Annexure P-4) without following the mandatory drill of Section 202 of the Cr.P.C. The impugned order (Annexure P-4) has been passed in a mechanical manner, without application of judicial mind and as such, deserves to be set aside.

6. *Per contra* learned counsel for the respondent no. 2-complainant emphatically opposes the prayer of the petitioners. He submits that the complicity of the petitioners is clear and they cannot take shelter of fact that they resigned prior to the bouncing of the cheque. A perusal of Memorandum of Settlement (Annexure P-5) indicates that in July, 2018 when the six cheques were issued, the petitioners were directors of HDIL. At the time of filing of the complaint, respondent no. 2 has duly complied with the direction of this Court in **Anil Chanana v. M/s Gyani Ram Ruliya Ram 2019(1) R.C.R(Criminal) 388** by attaching Form 32 with the complaint, which duly reflects names of the petitioners as Directors of HDIL.

7. Furthermore, learned counsel for the respondent no. 2-complainant relies on para 38 of **P. Mohanraj v. M/s Shah Brothers Ispat Pvt. Ltd. 2021(2) R.C.R.(Criminal) 711** and submits that petitioners can be prosecuted for committing an offence under Section 138 of the NI Act even if insolvency proceedings are initiated before filing of the complaint.

8. Finally, learned counsel for the respondent no. 2-complainant submits that disputed facts cannot be determined by this Court on the basis of the probable defence taken by the petitioners in the present petition. It is settled law that disputed questions of fact can only be adjudicated after the parties have duly adduced their evidence and this Court cannot evaluate the truthfulness of the allegations or the veracity of the defence, however, convincing it might seem. Reliance in this regard is placed on the judgment rendered by the Hon'ble Supreme Court in **HMT Watches Limited vs M.A. Abida (2015) 11 SCC 776** where it has been held that that inherent powers under Section 482 of the Cr.P.C.cannot be extended to determining question of facts. It is only for the trial Court to determine the disputed questions of fact after examining the evidence on record and interference by this Court with regards to factual questions is impermissible in law.

OBSERVATIONS AND ANALYSIS

9. Having heard learned counsel for the parties and after perusing the record with their able assistance, it transpires that most of the petitioners are senior

citizens and reside in Mumbai and the drill of Section 202 of the Cr.P.C. was not followed and neither learned counsel for respondent no. 2-complainant nor learned State counsel have been able to controvert the same. For this purpose, this Court takes cue from the judgment of Hon'ble Supreme Court in **Abhijit Pawar vs. Hemant Madhukar 2017(3) SCC 528, National Bank of Oman vs. Barakara Abdul Aziz and another 2013(2) SCC 488** and judgment of this Court in **Dr. Jasminder Kaur vs. Raj Karan Singh Boparai CRM-M-20260-2008**.

10. A two judgment Bench of Hon'ble Supreme Court in **Abhijeet Pawar (supra)**, speaking through Justice A.K. Sikri has held:-

“28. No doubt, the argument predicated on Section 202 of the Cr.P.C. was raised for the first time by A-1 before the High Court. Notwithstanding the same, being a pure legal issue which could be tested on the basis of admitted facts on record, the High Court could have considered this argument on merits. It is a settled proposition of law that a pure legal issue can be raised at any stage of proceedings, more so, when it goes to the jurisdiction of the matter (See : National Textile Corpn. Ltd. Vs. Nareshkumar Badrikumar Jagad; [(2011) 12 SCC 695].

29. We may like to record that though Mr. Bhatt had refuted the arguments founded on Section 202 of Cr.P.C., even he had submitted that in case this Court is satisfied that mandatory requirement of Section 202 is not fulfilled by the learned Magistrate before issuing the process, this Court can direct the Magistrate to do so. Mr. Bhatt, for this purpose, referred to the judgment in the case of the National Bank of Oman.

30. For the aforesaid reasons, Criminal Appeal arising out of SLP (Crl) No. 9318 of 2012 is allowed thereby quashing the notice dated 24 th November, 2009 in respect of A-1 with direction to the learned Magistrate to take up the matter afresh qua A-1 and pass necessary orders as are permissible in law, after following the procedure contained in Section 202, Cr.P.C.”

11. A two Judge bench of the Hon'ble Supreme Court in **National Bank of Oman(supra)** has held as follows:

“10. We are of the view that the High Court has correctly held that the above-mentioned amendment was not noticed by the C.J.M. Ahmednagar. The C.J.M. had failed to carry out any enquiry or ordered investigation as contemplated under the amended Section 202 of the Code of Criminal Procedure. Since it is an admitted fact that the accused is residing outside

the jurisdiction of the C.J.M. Ahmednagar, we find no error in the view taken by the High Court. All the same, the High Court instead of quashing the complaint, should have directed the Magistrate to pass fresh orders following the provisions of Section 202 of the Code of Criminal Procedure. Hence, we remit the matter to the Magistrate for passing fresh orders uninfluenced by the prima facie conclusion reached by the High Court that the bare allegations of cheating do not make out a case against the accused for issuance of process under Section 418 or 420 of the Indian Penal Code. The C.J.M. will pass fresh orders after complying with the procedure laid down in Section 202 Code of Criminal Procedure, within two months from the date of receipt of this order.”

Further, a coordinate bench of this Court in **Dr. Jasminder Kaur (supra)** has made the following observations:

“Therefore, in view of the law laid down, on which reliance has been placed by learned counsel for the petitioners, I find that the examination of the complainant and eye witness alone under Section 200 Cr.P.C. cannot be held as the enquiry as prescribed under Section 202 (1) Cr.P.C. Admittedly, in the present case, no enquiry as prescribed under Section 202 (1) Cr.P.C. has been made by the Court and non-compliance of the provisions of Section 202 (1) Cr.P.C., which are mandatory in nature, the summoning order cannot be passed where the respondents are residing outside the jurisdiction of the Court where the complaint was filed.”

CONCLUSION 12. Having heard the learned counsel for the parties, keeping in view the facts of the case and without commenting on the merits of the case lest it may prejudice the outcome of the trial, the present petitions are allowed and summoning order dated 25.11.2019(Annexure P-4) is set aside and the matter is remanded back to learned Judicial Magistrate Ist Class, Ludhiana to consider the matter afresh in accordance with law, by taking recourse to Section 202 Cr.P.C.

13. All petitions are disposed of in above terms. Pending miscellaneous application(s), if any, shall also stand disposed of.
14. Nothing observed hereinabove shall be construed as expression of opinion of this Court on merits of the case and the trial Court shall proceed without being prejudiced by observations of this Court.

LAWYER E NEWS

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