

A.F.R.**Court No. - 93**WWW.LIVELAW.IN**Case :- APPLICATION U/S 482 No. - 14051 of 2008****Applicant :- Virendra Kumar Sharma****Opposite Party :- State of U.P. and Another****Counsel for Applicant :- Manoj Kumar Rai, K.C. Tripathi****Counsel for Opposite Party :- Govt. Advocate****Hon'ble Sameer Jain, J.**

Case called out in the revised list. Despite service of notice, none appeared on behalf of the opposite party No. 2.

Heard Sri Manoj Kumar Rai, learned counsel for the applicant, learned AGA for the State-respondent and perused the record.

The present application u/s 482 Cr.P.C. has been filed by the applicant to quash the proceedings of complaint case No. 1690 of 2007, (Surendra Singh Vs. Virendra Kumar Sharma), under Section 138 Negotiable Instruments Act, P.S. Bhelapur, District Varanasi pending before IInd Chief Judicial Magistrate, Varanasi.

Learned counsel for the applicant, at the very outset, contended that he is challenging the proceeding pending against the applicant only on the sole ground that without recording the statements of opposite party No. 2 and witnesses, under sections 200 and 202 Cr.P.C., summoning order dated 2.2.2008 was passed by the learned Additional Chief Judicial Magistrate, Court No. 2, Varanasi against the applicant, therefore, entire proceeding of the impugned complaint case, pending against the applicant, is bad in the eye of law.

Except this, no other argument was advanced on behalf of the applicant.

Per contra, learned AGA contended that for passing the summoning order under Section 138 Negotiable

Instruments Act, there is no requirement of recording of the statements under Sections 200 and 202 Cr.P.C. and if as per the trial court, complaint discloses prima facie offence under Section 138 Negotiable Instruments Act then applicant/accused can be summoned and, therefore, there is no illegality in the summoning order and the present applicant u/s 482 Cr.P.C. is liable to be rejected .

The present matter relates to Negotiable Instruments Act and on 2.2.2008, applicant was summoned under Section 138 Negotiable Instruments Act.

Perusal of the summoning order dated 2.2.2008 shows that cheque issued by the applicant in favour of the Firm of opposite party No. 2 was dishonoured and thereafter, notices on behalf of opposite party No. 2 were given to the applicant for payment of the cheque amount but inspite of that, no payment was made then ultimately opposite party No. 2 filed complaint of the present case, under Section 138 Negotiable Instruments Act against the applicant. Therefore, from the perusal of the complaint, a prima facie case under Section 138 Negotiable Instruments Act is made out against the applicant.

Further, Section 145 of the Negotiable Instruments Act, 1881, which was introduced by the Parliament by Act No. 55 of 2002 (w.e.f. 6.2.2003), states as follows:-

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.

Thus, as per Section 145(1) of the Negotiable Instruments Act, the evidence of complainant may be given by him on affidavit, and for summoning of accused under Section 138

Negotiable Instruments Act, recording of statements under Sections 200 and 202 Cr.P.C., is not required.

In the present case, from the perusal of the summoning order dated 2.2.2008, it is apparent that while passing this order, learned Magistrate perused the complaint as well as affidavit filed in support of the complaint filed by opposite party No. 2 and other documents including cheque etc. and, therefore, in view of the Provisions of Section 145 (i) Negotiable Instruments Act, it cannot be said that learned trial court committed any error while summoning the applicant as there was no need to record the statements either under Sections 200 Cr.P.C. or 202 Cr.P.C.

Recently, Constitution Bench of Hon'ble Supreme Court **In Re.: Expeditious Trial of Cases Under Section 138 N.I. Act 1881** reported in **[AIR 2021 Supreme Court 1957]** in paragraph-12 observed as under:-

"12. 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."

Thus, it is clear from the above judgement of Hon'ble Supreme Court that even on the basis of affidavit filed on behalf of the complainant, an accused can be summoned under Section 138 Negotiable Instruments Act and there is no need to record statements under Sections 200 and 202 Cr.P.C.

Having considered the aforesaid facts and circumstances of the case, it is apparent that there is no illegality committed by the learned trial court while passing the summoning order dated 2.2.2008 against the applicant. Therefore, the present application u/s 482 Cr.P.C., is devoid of merit and is, accordingly, **dismissed**.

Interim order, if any, stands vacated.

Order Date :- 8.12.2021

Ankita