

**Amarjit Singh Vs. Jasjit Singh**

**Amarjit Singh Vs. Jasjit Singh**

**SooperKanoon Citation :** [sooperkanoon.com/952071](http://sooperkanoon.com/952071)

**Court :** Chhattisgarh

**Decided On :** Apr-20-2011

**Judge :** T.P. Sharma

**Appeal No. :** Criminal Misc Petition No 203 of 2011

**Appellant :** Amarjit Singh

**Respondent :** Jasjit Singh

**Judgement :**

(Petition under Section 482 of the Code of Criminal Procedure 1973)

1. By this petition under Section 482 of the Code of Criminal Procedure, 1973 (for short 'the Code, 1973'), the petitioner has prayed for quashment of Criminal Complaint Case No.183/2011 pending in the Court of Additional Chief Judicial Magistrate, Raipur in which the Court below has taken cognizance against the petitioner and has issued process vide order dated 28-10-2010 substantially on the ground of lack of territorial jurisdiction and non-compliance of mandatory provisions contained in Section 202 (1) of the Code.

2. As per copy of the complaint filed on behalf of the respondent, dispute relating to tenancy of accommodation situate at Chandigarh was resolved and the petitioner issued cheque of Rs.90 lakhs on 20-8-2010 in favour of the respondent, same was presented for encashment on 24-8-2010 at ING Vysya

Bank Limited, Branch Raipur, same was bounced on the ground of insufficiency of money and difference in signature of the drawer i.e. the petitioner herein. Notice as required under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act') was served upon the petitioner which the petitioner has received on 16-9-2010 and 17-9-2010. Finally, complaint under Section 138 of the Act was filed along with evidence on oath and other documents. On the basis of evidence on oath of the respondent, the Court below has taken cognizance and has issued process against the petitioner vide the order impugned.

3. I have heard learned counsel for the petitioner, perused the petition and other documents.

4. Learned counsel for the petitioner vehemently argued that originally the dispute relates to accommodation situate at Chandigarh, as per the complaint, the alleged cheque of Rs.90 lakhs has been issued by the petitioner at Chandigarh and account of the petitioner is at Punjab and Sind Bank, Branch Chandigarh. The respondent is residing at Raipur, he has presented the cheque before the bank situate at Raipur and has issued notice at Raipur. These facts do not give jurisdiction to the Court situate at Raipur for taking cognizance of the offence punishable under Section 138 of the Act. Learned counsel further argued that Act 25 of 2005 came into force with effect from 23-6-2006 and according to this amended provision, the Magistrate taking cognizance of the offence on the basis of complaint is under obligation to 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 and in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, the provision is mandatory. In case the accused resides at a place beyond the area in which the Magistrate exercises his jurisdiction, conduction of inquiry into the case by the Magistrate or directing an investigation to be made by a police officer in accordance with Section 202 of the Code is mandatory. Learned counsel also argued that in the present case, the Magistrate has not examined the complainant or his witnesses under Section 200 of the Code, he has not inquired or directed for investigation under Section 202 of the Code and

thereby committed grave illegality. In these circumstances, the order taking cognizance and continuance of criminal complaint before such Court is abuse of the process of the Court and the Court below has committed grave illegality and caused serious prejudice to the petitioner.

5. Learned counsel for the petitioner placed reliance in the matter of *Shri Ishar Alloy Steels Ltd. v. Jayaswals NECO Ltd.* in which the Supreme Court has held that "the bank" referred to in clause (a) to the proviso to Section 138 of the Act would mean the drawee-bank on which the cheque is drawn and not all banks where the cheque is presented for collection including the bank of the payee, in whose favour the cheque is issued. Learned counsel further placed reliance in the matter of *Adalat Prasad v. Rooplal Jindal and others* in which the Supreme Court has held that the Magistrate taking cognizance without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202 of the Code, may be vitiated by invoking extra ordinary jurisdiction under Section 482 of the Code. Learned counsel also placed reliance in the matter of *M/s. Harman Electronics (P) Ltd. and another v. M/s. National Panasonic India Ltd.* in which the Supreme Court has held that mere issuance of notice from any place does not give jurisdiction for trial of complaint filed under Section 138 of the Act and the Courts are required to consider the fact as to whether cause of action or part of cause of action arose at a place where the complainant has filed the complaint or not. Learned counsel relied upon the matter of *S.K. Bhowmik v. S.K. Arora and another* in which the Punjab and Haryana High Court has held that the Magistrate cannot issue process to an accused who resided outside his territorial jurisdiction without holding inquiry under Section 202 of the Code which is mandatory. Learned counsel further relied upon the order dated 14-10-2010 passed by the High Court of Punjab and Haryana in *Cri.Misc. No.M-7689/2009 (Savera Sidhu v. Harleen Sidhu and another)* in which the High Court of Punjab and Haryana has held that in case the accused residing beyond the jurisdiction of the Magistrate, the Magistrate shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.

6. As held by the Supreme Court in the matter of Adalat Prasad (supra) and in catena of decisions of the Supreme Court, in appropriate cases, petition under Section 482 of the Code may be entertained even against the interlocutory order or any order (i) to give effect to an order under the Code; (ii) to prevent abuse of the process of court; and (iii) to otherwise secure the ends of justice.

7. In the present case, as per copy of the order taking cognizance and issuance of process, copy of the complaint, copy of the notice issued to the petitioner and copy of the information given by the bank relating to dishonour of cheque, the petitioner has issued cheque of Rs.90 lakhs on 20-8-2010 relating to Punjab and Sind Bank, Branch Chandigarh, same was presented for payment and the cheque was bounded. Notice has been served upon the petitioner, but the petitioner has not complied the notice. Complaint made by the respondent has been supported by evidence on affidavit as required and permissible under Section 145 of the Act.

8. Section 202 of the Code has been amended vide Act 25 of 2005 with effect from 23-6-2006 relating to inquiry/investigation and in case of accused residing beyond the area in which the Magistrate exercises the jurisdiction. The word 'shall' has been used by the legislature in the inserted provision. Sub-section (1) of Section 202 of the Code reads thus,

"202. Postponement of issue of process.-(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized 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 Sessions; 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."

9. The Negotiable Instruments Act, 1881 is a special act and substantive procedure for making complaint and taking cognizance has been provided in Chapter XVII of the Negotiable Instruments Act, 1881. A special provision has been made under Section 142 of the Act for taking cognizance of offences, having overriding effect over the Code. Section 142 of the Act reads thus,

"142. Cognizance of offences.-Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138."

10. Sections 145 and 146 of the Act further provide special procedure having overriding effect on the Code. As per Section 145 of the Act, the evidence of the complainant may be 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. As per Section 146 of the Act, Bank's slip showing dishonour of cheque is prima facie evidence. Sections 145 and 146 of the Act read 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.

146. Bank's slip prima facie evidence of certain facts.-The Court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured presume the fact of dishonour of such cheque, unless and until such fact is disproved."

11. Special procedure for trying the cases summarily has also been provided in Section 143 of the Act and mode of service of summons has been provided in Section 144 of the Act which are also having overriding effect over the Code. The Code of Criminal Procedure, 1973 is a general law. The Negotiable Instruments Act, 1881 is a special law which provides complete procedure for taking cognizance and trial of the offence punishable under Section 138 of the Act having its overriding effect over the Code of Criminal Procedure, 1973. As per Section 145 of the Act, evidence on affidavit of the complainant is permissible in trial or proceeding. As per Section 146 of the Act, bank's slip is also prima facie evidence for establishing the fact of dishonour of cheque.

12. In the present case, the complainant has given evidence on affidavit in accordance with Section 145 of the Act and he has also filed bank's slip which is prima facie evidence. In accordance with Section 202 of the Code, in case of accused residing at a place beyond the area in which the Magistrate exercises its jurisdiction, the Magistrate is required to inquire either by himself or direct an investigation to be made by a police officer. The legislature has amended Section 202 of the Code vide Act 25 of 2005 and has used the word `shall' in case of accused residing at a place beyond the area in which the Magistrate exercises his jurisdiction.

13. In the matter of Shivjee Singh v. Nagendra Tiwary and others the Supreme Court while dealing with the effect of the word "shall" occurring in Section 202 of the Code, has held that if violation of procedural provision does not result in denial of fair hearing or does not cause prejudice to parties, such provision has to be treated as directory notwithstanding use of the word "shall". Para 7 of the said judgment reads thus,

"7. We have considered the respective submissions, By its very nomenclature, Cr PC is a compendium of law relating to criminal procedure. The provisions contained therein are required to be interpreted keeping in view the well-recognized rule of construction that procedural prescriptions are meant for doing substantial justice. if violation of the procedural provision does not result in denial of fair hearing or causes prejudice to the parties, the same has to be treated as directory notwithstanding use of the word "shall"."

14. As per para 5 of the complaint, the petitioner has issued cheque of Rs.90 lakhs of Punjab and Sind Bank, Branch Chandigarh to the respondent which has been dishonoured. Para 5 of the evidence of the respondent on affidavit reveals that the petitioner has given aforesaid cheque of Rs.90 lakhs at Raipur which the respondent has presented before the bank situate at Raipur and the said cheque has been dishonoured. As held by the Supreme Court in the matter of Shri Ishar Alloy Steels (supra), the word `bank' referred to in clause (a) to the proviso to Section 138 of the Act means the drawee- bank on which the cheque is drawn and not all banks where the cheque is presented for collection including the bank of the payee, in whose favour the cheque is issued. In the present case, bank means the bank situate at Chandigarh.

15. In order to decide the jurisdiction of the Court, as held by the Supreme Court in the matter of M/s. Harman Electronics (supra), in case of offence punishable under Section 138 of the Act, the Court does not derive jurisdiction only on the basis that the complainant has issued notice from that place, but the Courts are required to consider whether cause of action or part of the cause of action arose within the territorial jurisdiction of the Court before whom the complaint has been filed.

16. In the present case, as per evidence of the complainant/respondent on oath, the petitioner has given alleged cheque at Raipur, same was presented before the bank situate at Raipur and the respondent has sent notice to the accused/petitioner from Raipur. Although the cheque has been issued to settle the dispute arose at Chandigarh, but the said dispute is not the subject matter of the present case filed under Section 138 of the Act. In the present case, the dispute is relating to issuance of cheque, dishonour of cheque, serving notice and non-payment of the amount of cheque after serving notice.

17. As per complaint and evidence on affidavit, the petitioner has issued cheque of Rs.90 lakhs at Raipur to the respondent and the respondent has presented the cheque for payment before the bank situate at Raipur, same was dishonoured and the respondent has served notice to the petitioner from Raipur. In the present case, the petitioner is residing at Chandigarh and the drawee-bank is also situate at Chandigarh, but most part of the cause of action arose within the territorial jurisdiction of the Court situate at Raipur and not at Chandigarh. Therefore, the Court situate at Raipur is not lacking jurisdiction to try such offence.

18. The Negotiable Instruments Act, 1881 is a special Act mostly having overriding effect over the Code of Criminal Procedure, 1973. Special procedure has been prescribed under the Act and the Court has adopted the aforesaid special procedure having its overriding effect over the Code. Although the trial Court has not enquired or directed for investigation in accordance with Section 202 of the Code, but in the light of evidence of the complainant on affidavit and bank's slip prima facie evidence in terms of Sections 145 and 146 of the Act, virtually, no further enquiry was necessary for proceeding against the petitioner or for issuance of process.

19. While dealing with the question of applicability of the provisions of the Code, in case of offence punishable under Section 138 of the Act, in view of the non obstante clause, the Supreme Court has held in the matter of Damodar S. Prabhu v. Sayed Babalal H. that the provisions relating to compounding of offence under Section 147 of the Act are not governed by Section 320 of the

Code in view of non obstante clause in Section 147 of the Act. Para 8 of the said judgment reads thus,

"8. At this point, it would be apt to clarify that in view of the non obstante clause, the compounding of offences under the Negotiable Instruments Act, 1881 is controlled by Section 147 and the scheme contemplated by Section 320 of the Code of Criminal Procedure (Hereinafter 'Cr.P.C.') will not be applicable in the strict sense since the latter is meant for the specified offences under the Indian Penal Code. So far as the Cr.P.C. is concerned, Section 320 deals with offences which are compoundable, either by the parties without the leave of the court or by the parties but only with the leave of the Court. Sub-section (1) of Section 320 enumerates the offences which are compoundable without the leave of the Court, while sub-section (2) of the said section specifies the offences which are compoundable with the leave of the Court. Section 147 of the Negotiable Instruments Act, 1881 is in the nature of an enabling provision which provides for the compounding of offences prescribed under the same Act, thereby serving as an exception to the general rule incorporated in sub-section (9) of Section 320 of the Cr.P.C. which states that 'No offence shall be compounded except as provided by this Section'. A bare reading of this provision would lead us to the inference that offences punishable under laws other than the Indian Penal Code also cannot be compounded. However, since Section 147 was inserted by way of an amendment to a special law, the same will override the effect of Section 320 (9) of the Cr.P.C., especially keeping in mind that Section 147 carries a non obstante clause."

20. In the present case, Sections 142, 143, 144 and 145 of the Act carry non obstante clause "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)" and in view of the non obstante clause, inquiry for taking cognizance of the offence punishable under Section 138 of the Act on the basis of evidence in terms of Sections 145 and 146 of the Act, taking cognizance of the offence by the Magistrate and issuance of process to the accused on the basis of such evidence in accordance with Section 142 of the Act, are not controlled by the provisions of Chapter XV of the Code.

21. As held by the Supreme Court in the matter of M/s. Harman Electronics (supra), in the present case, the Magistrate has taken cognizance not merely on the basis of issuance of notice from Raipur, but on the basis of allegation made in the complaint relating to issuance of cheque by the petitioner to the complainant/respondent at Raipur.

22. As held by the Punjab and Haryana High Court in the matters of S.K. Bhowmik (supra) and Savera Sidhu (supra), the provisions of Section 202 of the Code are mandatory in nature, though in case of mandatory provisions the accused/party is required to show that prejudice has been caused to him by not complying the aforesaid provisions by the opposite party.

23. In the present case, even otherwise, after arguing at length, counsel for the petitioner has not been able to show as to what prejudice has been caused to the petitioner by not complying the provisions contained in Section 202 of the Code.

24. The Negotiable Instruments Act, 1881 is a special Act. Chapter XVII of the Act provides substantive procedure for penalties, inquiry and trial of the offence punishable under Section 138 of the Act. The provisions contained in Section 142 of the Act - taking cognizance of offences, Section 143 of the Act - power of Court to try cases summarily, Section 144 of the Act - mode of service of summons and Section 145 of the Act - evidence on affidavit, begin with the words "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)" i.e. non obstante clause having overriding effect, are not controlled by the Code. In the light of provisions contained in Sections 145 and 146 of the Act, evidence on affidavit of the complainant and bank's slip are sufficient for taking cognizance of the offence punishable under Section 138 of the Act by the Magistrate and nothing is required for inquiry or for directing investigation before taking cognizance. In these circumstances, the Magistrate has not committed any illegality in taking cognizance of the offence punishable under Section 138 of the Act and issuing process against the petitioner. Therefore, criminal proceeding pending against the petitioner in the Court of Additional Chief Judicial Magistrate, Raipur would not be abuse of the process

of the Court or the Court below has not committed serious illegality by not complying the provisions of Section 202 of the Code causing serious prejudice to the petitioner.

25. Consequently, I do not find any substance in the petition, same is liable to be dismissed and it is hereby dismissed, in limine.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**