**IN THE HIGH COURT OF UTTARAKHAND**

**AT NAINITAL**

**Criminal Miscellaneous Application No. 362 of 2023**

Bhupendra Kumar Kukreti .....Applicant

Versus

State of Uttarakhand
and Another

.....Respondents

Mr. S.K. Mandal, Advocate for the applicant.
Mr. T.C. Agarwal, A.G.A. for the State.

Dated: 28th February, 2023

**Hon'ble Sharad Kumar Sharma, J.**

The present applicant, is as an opposite party to the proceedings under Section 138 of the Negotiable Instruments Act, which stood registered by way of Criminal Complaint Case No. 1155 of 2022, Anuj Kumar Vs. Bhupendra Kumar Kukreti, which stood instituted before the court of Judicial Magistrate, Rishikesh, District Dehradun. The court of Judicial Magistrate, Rishikesh, District Dehradun, have issued the summoning order, whereby, the present applicant has been summoned to be tried for the offence under Section 138 of the Negotiable Instruments Act which is under challenge.

2. There are three-fold arguments of the learned counsel for the applicant in order to put a challenge to the summoning order, which has been

issued under Section 138 of the Negotiable Instruments Act, on 07.01.2022.

3. To summarize the argument extended by the learned counsel for the applicant, **firstly** he submits, that for the purposes of drawing a conclusion in order to justify the sustainability of the summoning order, the assimilation of facts based on appreciation of evidence is required to be done by the Courts under section 482 CrPC and that would be falling well within the scope of Section 482 of the Code of Criminal Procedure. **Secondly**, he submits that the summoning order would be bad in the eyes of law because the provisions contained under Section 202 of the Code of Criminal Procedure, which he contends to be mandatory, has not been complied with. **Thirdly**, he contends, that since there had been several prior instituted civil suits, being Civil Suit No. 37 of 2021 and Civil Suit No.49 of 2021 and a proceedings, which was instituted before the commercial courts, the resort to the complaint proceedings under Section 138 of Negotiable Instruments Act, ought to have been avoided by the complainant.

4. This Court feels it to answer the first question, raised by the learned counsel for the applicant as to whether in the exercise of powers under Section 482, whether the High Court could assimilate and appreciate the evidences or scrutinize the same for the purposes of scrutinizing, its jurisdiction under Section 482 in support of its contention, the learned counsel for the applicant has

made reference to a judgment of (2013) 6 SCC 323, Umesh Kumar Vs. State of Andhra Pradesh and, particularly, he has referred to paragraph 12 of the said judgment which is extracted hereunder;

> "12. In view thereof, if any person has forged in a letter under the name of the Samithi and forged the signature of Shri M.A. Khan, M.P., the matter being of grave nature requires investigation and, in view of above, we cannot find fault with the action initiated against Umesh Kumar, appellant. Once criminal law is put in motion and after investigation the charge sheet is filed, it requires scrutiny in the court of law. However, before the charges could be framed, Umesh Kumar, appellant, approached the High Court under Section 482 Cr.P.C. for quashing of the charge sheet. The scope of Section 482 Cr.P.C. is well defined and inherent powers could be exercised by the High Court to give effect to an order under the Cr.P.C.; to prevent abuse of the process of court; and to otherwise secure the ends of justice. **This extraordinary power is to be exercised ex debito justitiae. However, in exercise of such powers, it is not permissible for the High Court to appreciate the evidence as it can only evaluate material documents on record to the extent of its prima facie satisfaction about the existence of sufficient ground for proceedings against the accused and the court cannot look into materials, the acceptability of which is essentially a matter for trial**. Any document filed alongwith the petition labelled as evidence without being tested and proved, cannot be examined. Law does not prohibit entertaining the petition under Section 482 Cr.P.C. for quashing the charge sheet even before the charges are framed or before the application of discharge is filed or even during its pendency of such application before the court concerned. The High Court cannot reject the application merely on the ground that the accused can argue legal and factual issues at the time of the framing of the charge. However, the inherent power of the court should not be exercised to stifle the legitimate prosecution but can be exercised to save the accused to undergo the agony of a criminal trial."

5. In fact, if the implication of paragraph 8 is itself is taken into consideration in its entirety, paragraph 12 itself lays down, that the High Court in the exercise of its powers under Section 482 of CrPC, it is not permissible for the High Court to appreciate the evidences, which has been alternative attempted to be argued as if it is to be interpreted as to be a word "assimilation of the evidence". In order to evaluate the material documents on record to the

extent of establishment of the *prima facie* case or existence of a sufficient ground to take cognizance as against the summoning order in the exercise of powers under Section 482.

6. In order to answer the aforesaid argument, which has been extended by the learned counsel for the applicant in the context of the judgment of Umesh Kumar (*supra*), this Court feels it necessary to observe, that there has been consistent view, that the powers of Section 482 cannot be extended, in the manner in which the learned counsel has attempted to argue, that it is not an "**appreciation of evidence**", but rather "**assimilation of evidence**", which is required to be scrutinize by the High Court in the exercise of its inherent powers under Section 482, as to whether at all the summoning order issued under Section 138 of NI Act, could be justified. In fact, the Hon'ble Apex Court in a judgment reported in (2010) 6 SCC 588, "Harish Maganlal Baijal Vs. State of Maharashtra and Others" has answered the said question, that the High Court has not to embark upon an inquiry into the evidence of a case, particularly into the questions as to whether it is reliable or not! whether it is reasonably acceptable for the purposes of eradicating the apprehension expressed by the accused person against whom the notices under Section 138 of NI Act has been issued.

7. Yet, in another judgment as reported in (2008) 1 SCC 747, "R.K. Mobisana Singh Vs. Kh. Temba Singh and Others" almost a similar view has been taken by the Hon'ble Apex Court, wherein, it

has been observed, that the powers to be exercised by the High Court under Section 482 of CrPC, has to be sparingly and carefully used and it cannot be used as to be a substitute to appreciate an evidence and conduct a trial itself, and particularly to eradicate an oblique motive of the applicant to install the proceedings of the criminal law, which has been put to motion by resorting to the proceedings under Section 482. The Hon'ble Apex Court in a judgment reported in (2000) Supreme Court Cases Cri 379, "Rosy and Another Vs. State of Kerala and Others" has almost laid down the similar principles that the 482 proceedings are not to be taken as a substitute to the proceedings of trial, wherein, appreciation could be made of an evidence, in order to justify the gist and reasoning of the issuance of the summoning order.

8. In that eventuality, what bearing would the impact of the proceedings of Civil Suit No. 37 of 2021 or Civil Suit No. 49 of 2021, would have to the summoning order dated 07.11.2022, will not fall for within an ambit of consideration, under so-called concept of assimilation of evidence, which the counsel for the applicant contends, that they could be assimilated to be extracted by this Court in the exercise of its powers under Section 482, which is otherwise specifically barred by the judicial precedents of the Hon'ble Apex Court.

9. The second limb of argument of the learned counsel for the applicant is that if the summoning order is taken into consideration, it does

not satisfies the test of compliance of the provisions contained under Section 202 of the Code of Criminal Procedure. If the provisions contained under Section 202 of the Code of Criminal Procedure itself is taken into consideration, which for the purposes of brevity is extracted hereunder:

> "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, 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 that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.
> (3) If an investigation under sub- section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer- in- charge of a police station except the power to arrest without warrant."

10. Section 202 when it contemplates for conducting of an inquiry, where the accused is a resident of a place outside the territorial jurisdiction of the Court, before whom the proceedings are drawn. The powers contained under Section 202 therein as per the opinion of this Court, as per its simplicitor language used by the legislature, Section

202 contemplates that “if he thinks fit”. The use of this word by the legislature under Section 202 itself makes it absolutely discretionary to the Court, whether at all conduct of an inquiry for the purposes of postponement of the issues of process, for satisfying as to whether there is a necessity to issue a summoning order in relation to those cases where the accused is a resident of a place beyond the territorial jurisdiction of the Court before whom the complaint proceedings are drawn. It is directory in nature and not mandatory, is also a self-explicit from the provisions contained under Section 202 of CrPC, itself, where, the provisions contained under Section 202 of CrPC call for, that it is either the Court or the Police agency or any other agency, which the Court think to be resorted to, may and may be used to conduct an inquiry into the purposes for satisfying the issuance of process to those residents, who are falling outside the territorial jurisdiction of the Court.

11. The necessity and the legal implication as per the opinion of this Court or the provisions contained under Section 202 of CrPC, apart from the fact that, it is not a mandatory provision because since there are different platforms and modes provided by the Courts which is ceased with the proceedings for conducting an inquiry and which is absolutely left open at the discretion of the Court to adopt any of the modes of enquiry, it basically intends that the inquiry which is required as per the provisions contained under Section 202 of CrPC, is basically intended to, safeguard to not to cause an harassment to the accused person, who is being

summoned by the court in the exercise of its powers under Section 202 of CrPC. The learned counsel for the applicant argues to the contrary that, in fact, the language used in the provisions contained under Section 202 of CrPC is mandatory and he argues so in the context from the principles laid down in the judgment rendered by the Hon'ble Apex Court, as reported in **(2013) 2 SCC 488, National Bank of Oman Vs. Barakara Abdul Aziz and Another**. Particularly, the learned counsel for the applicant has made reference to paragraph 12 of the said judgment, which is extracted hereunder;

> "12. 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 Cr.P.C. 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 I.P.C. The C.J.M. will pass fresh orders after complying with the procedure laid down in Section 202 Cr.P.C., within two months from the date of receipt of this order."

12. In fact, if the implications and guidelines of paragraph 12 are taken into consideration, the observations made therein was that in the absence of quashing of the complaint, due to non-compliance of the provisions contained under Section 202 of the Code of Criminal Procedure, the High Court should have remitted the matter back to the Magistrate for passing a fresh order, being uninfluenced by the prima facie conclusion drawn by the High Court. In fact, this paragraph itself on which the reliance has been placed by the learned counsel for the applicant does not deal with the issue, as it has been argued by the learned counsel for the applicant, that the

compliance of the provisions contained under Section 202 of CrPC is mandatory. It only contemplates, that in those cases, where the court finds that the compliance of Section 202 CrPC was at all required, the High Court should have remitted the matter back rather than quashing of the complaint proceedings. This reference to the judgment of National Bank of Oman (*supra*) may not justify the argument which has been extended by the learned counsel for the applicant.

13. In answer to his argument, with regards to the necessity of compliance of Section 202 of CrPC, a reference may be had to a judgment reported in **(2000) Supreme Court Cases (Cri) 379, Rosy and Another Vs. State of Kerala and Others**, where, the Hon'ble Apex Court, in its paragraph 8 while dealing with the impact of Section 200 of CrPC, has observed that the postponement of processes, in relation to those accused persons, who are intended to be summoned for facing a criminal trial in a complaint cases, it has observed, that the aforesaid Section 200 CrPC requires a Magistrate for taking cognizance of the offences on a complaint cases in order to necessitate to examine on both, the complainant and the witnesses, present, if any, before drawing a conclusion as to whether at all the summoning order is required to be issued to the accused persons. That is why in paragraph 10 of the said judgment, which is extracted hereunder:

> "10. It is only if the Magistrate decides to hold the inquiry the proviso to sub-section (2) of Section 202 would come into operation. If the offence is triable exclusively by the court of Sessions, the Magistrate himself has to hold the

inquiry and no direction for investigation by police shall then be made. Inquiry can be held for recording evidence on oath and if he thinks fit. Sub- section (2) of Section 202 gives discretion to the Magistrate to record evidence of witnesses on oath. To this discretionary power, the proviso carves out an exception. It provides that for the offence triable exclusively by the court of Session the Magistrate shall shall call upon the complainant to produce all his witnesses and examine them on oath. Then the next stage after holding inquiry is passing of appropriate order of either dismissal of the complaint or issue of process. That is provided under Sections 203 and 204 of the Code. Hence, on receipt of the complaint, the Magistrate by following the procedure prescribed under Section 200 may issue process against the accused or dismiss the complaint. Section 203 specifically provides that after considering the statement on oath, if any, of the complainant and witnesses and the result of the inquiry or investigation, if any, under Section 202, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint. For dis-missal of complaint, he is required to briefly record his reasons for so doing. In other cases, he has to issue process i.e. either summons or warrants as the case may be as provided under Section 204. However, no summons or warrant is to be issued against the accused until a list of the prosecution witnessess has been filed. Therefore, the question of complying with the proviso to sub-section (2) of Section 202 would arise only in cases where the Magistrate before taking cognizance of the case decides to hold the inquiry and secondly in such inquiry by him, if he decides to take evidence of witnesses on oath. But the object and purpose of holding inquiry or investigation under Section 202 is to find out whether there is sufficient ground for proceeding against the accused or not and that holding of inquiry or investigation is not an indispensable course before issue of process against the accused or dismissal of the complaint. It is an enabling provision to form an opinion as to whether or not process should be issued and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath."

14. It has been held, that its the Magistrate decides to hold, whether inquiry is at all required for

under sub-section 2 of Section 202, while it coming to a conclusion to necessitate the issuance of the summoning order.

15. Even otherwise also, this Court is of the view that if the summoning order dated 07.01.2022 is taken into consideration in the instant case, where, the Court has opted out to conduct an inquiry itself under Section 202 CrPC, which, itself is contemplated under the said provisions, the Court has observed in its paragraph 4 of the order, that for the purposes of Section 202 CrPC, the Court has examined the affidavits, the documents which has been placed on record incuding the memo of dishonor of cheques, the notices, the postal receipts, the A.D. tracking report, the reply to the notices. All these scrutinization made by the Court of Judicial Magistrate, Rishikesh, itself would mean that the court itself prior to the issuance of the notices have conducted an inquiry itself by scrutinizing the documents, which were placed before it. Even this Court is of the view that for the purposes of satisfying the conditions contained under Section 202 of CrPC, it does not deliberate upon, that it requires a prolonged and a detailed inquiry into all the vitalities of the controversy, pertaining to its interplay with the civil litigation which in the present case at hand, is pending, which is if at all required by the Magistrate to be undergone before issuance of the processes under Section 138 of the NI Act.

16. The language under Section 202 of CrPC, which has been extracted hereinabove, it uses the

word ‘either inquire into the case himself’ and the said expression given under Section 202 is bifurcated by the use of word ‘or’ before the other mode of investigation contemplated under Section 202 of CrPC, is directed to be resorted to. Meaning thereby, Section 202 of CrPC does intends, that all the modes of investigation given therein, has to be simultaneously resorted to together, particularly when its exclusively falling within the domain of the Magistrate concerned as to conduct an inquiry under either of the mode permissible under Section 202. Since, this Court has already observed that in the summoning order paragraph 4 itself, spells out that the court itself has conducted an inquiry and has gone into the material available before it to justify the summoning order which has been issued on 07.01.2022, it satisfies the test under Section 202 of the Cr.P.C. and as such, the argument extended by the learned counsel for the applicant that there is a procedural flaw in issuance of the summoning order, is not sustainable and which is not accepted by this Court. Consequently, the 482 application lacks merit and the same is accordingly dismissed.

**(Sharad Kumar Sharma, J.)**

28.02.2023

Ujjwal