IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1310 OF 2022

EKVEERA JEWELLERS ANTURLI, JALGAON AS A PROPRIETOR NANDKISHOR SHAMAKANT SONAR
VERSUS
SHAUNAK DEEPAK KULKARNI AND ANOTHER

AND
CRIMINAL WRIT PETITION NO.1311 OF 2022

EKVEERA JEWELLERS ANTURLI, JALGAON AS A PROPRIETOR NANDKISHOR SHAMAKANT SONAR
VERSUS
AISHWARYA D/O. DEEPAK KULKARNI AND ANOTHER

AND
CRIMINAL WRIT PETITION NO.1312 OF 2022

EKVEERA JEWELLERS ANTURLI, JALGAON AS A PROPRIETOR NANDKISHOR SHAMAKANT SONAR
VERSUS
NANDINI W/O. DEEPAK KULKARNI AND ANOTHER

AND
CRIMINAL WRIT PETITION NO.1313 OF 2022

EKVEERA JEWELLERS ANTURLI, JALGAON AS A PROPRIETOR NANDKISHOR SHAMAKANT SONAR
VERSUS
NANDINI W/O. DEEPAK KULKARNI AND ANOTHER

AND
CRIMINAL WRIT PETITION NO.1314 OF 2022

EKVEERA JEWELLERS ANTURLI, JALGAON AS A PROPRIETOR NANDKISHOR SHAMAKANT SONAR
VERSUS
NANDINI W/O. DEEPAK KULKARNI AND ANOTHER

AND
CRIMINAL WRIT PETITION NO.1315 OF 2022

EKVEERA JEWELLERS ANTURLI, JALGAON THROUGH ITS PROPRIETOR AND ANOTHER
VERSUS

DEEPAK DIWAKAR KULKARNI AND ANOTHER

AND
CRIMINAL WRIT PETITION NO.1316 OF 2022

EKVEERA JEWELLERS ANTURLI, JALGAON AS A PROPRIETOR NANDKISHOR SHAMAKANT SONAR
VERSUS
AISHWARYA D/O. DEEPAK KULKARNI AND ANOTHER

AND
CRIMINAL WRIT PETITION NO.1317 OF 2022

EKVEERA JEWELLERS ANTURLI, JALGAON AS A PROPRIETOR NANDKISHOR SHAMAKANT SONAR
VERSUS
SHAUNAK DEEPAK KULKARNI AND ANOTHER

AND
CRIMINAL WRIT PETITION NO.1318 OF 2022

EKVEERA JEWELLERS ANTURLI, JALGAON AS A PROPRIETOR NANDKISHOR SHAMAKANT SONAR
VERSUS
SHUBHENDU DEEPAK KULKARNI AND ANOTHER

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Mrs. Rashmi Kulkarni a/w Ms. Namita Thole and Rohit Dhongde,, Advocate for the Petitioner.
Mrs. P. V. Diggikar, APP for Respondent-State.
Mr. Shripad Dodiya h/f Mr. Sunil Kaldate, Advocate for Respondent No.1.

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CORAM : S. G. CHAPALGAONKAR, J.

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RESERVED ON : 10th OCTOBER, 2023.
PRONOUNCED ON : 21st DECEMBER, 2023.

ORDER:-

1. This group of Writ Petitions is clubbed together for hearing, since it raises common question of law and facts. It arises out of the complaints instituted under Section 138 of the Negotiable Instrument Act by respective respondents

against the petitioner. The petitioner raises challenge to the order of issuance of process passed by the Judicial Magistrate First Class, Jalgaon, so also the order of the Sessions Court passed in Revision, thereby confirming the order of Magistrate.

2. In nutshell, the complaints are filed with contention that the respondent is in the business of selling gold and silver ornaments and runs his business in the name and style as "Ekveera Jewellers Anturli". In pursuance of the said business, the petitioner had floated a scheme by which on investment of certain amount for more than two years, the interest at the rate of 1.25% per month was offered. On expiry of two years locking period, the investor was entitled to receive his deposited amount alongwith interest or gold of equal amount. The complainants participated in the scheme and deposited the amount. In lieu of the aforesaid deposits, the petitioner issued cheques, however, on presentation, dishonored with endorsement "payment stopped by drawers". The respondent issued demand notice, which has been duly served upon the petitioner. However, he failed to comply the notice by giving false reply, as such complaint has been filed.

3. On presentation of the complaints, the learned Magistrate passed the order below Exhibit-1, which reads thus:

> *"Heard the learned Advocate for the complainant. Read the complaint and perused the documents. The complaint is made for offence punishable under Section 138 of the Negotiable Instrument Act. The complainant complied all things which are mandatory under the Negotiable Instrument Act. The offence punishable under Section 138 of the Negotiable*

Instrument Act has been specifically made out in the complaint. Hence, I pass the following order

ORDER

Issue process for the offence punishable under Section 138 of the Negotiable Instrument Act against the accused."

4. The petitioner aggrieved by aforesaid order filed Criminal Revision Application under Section 397 of the Criminal Procedure Code before Sessions Judge, Jalgaon raising multifarious challenge. The learned Sessions Judge dismissed the Revision Application. Hence, the petitioner filed present Criminal Writ Petitions.

5. Mrs. Rashmi Kulkarni, learned Advocate alongwith Ms. Namita Thole and Rohit Dhongde, learned Advocates appearing for the petitioner submits that although there are several grounds for challenge she would restrict submissions on the crucial issue which goes to the root of the matter. She would contend that the petitioner resides at Anturli, Tq. Muktainagar, Dist. Jalgaon i.e. beyond jurisdiction of the Magistrate at Jalgaon. The complaint has been instituted in the Court Judicial Magistrate First Class at Jalgaon. However, while passing the impugned order of issuance of process, the mandate under Section 202 of the Criminal Procedure Code is not observed. By inviting attention of this Court to the contents of impugned order she would contend that neither enquiry appears to have been carried by the Magistrate nor reasons are recorded to dispense with such inquiry mandated before issuance of process. On this count only the impugned order deserves to be quashed and set aside. She would further submit that the learned Magistrate as well as the Court of Sessions ignored the mandate of law requiring enquiry before issuance of process in case accused

resides beyond territorial jurisdiction of the Magistrate. To buttress her contentions she would rely upon the judgment of this Court in case of ***Shivshankar Shrikushna Dhole Vs. State of Maharashtra and Ors.***[1], ***Sayed Mohammed Omair Sayed Ibrahim and Others Vs. State of Maharashtra and Others***[2], unreported judgment of this Court in the matter of ***Dr. Anita Patil Deshmukh Vs. Ashok Babulal Agrawal*** dated ***18.08.2023*** in ***Criminal Writ Petition No.750/2022*** and ***Ismail Suleman Shaikh Vs. Hanif Rafique Sayyad*** dated ***22.02.2023*** in ***Criminal Application No.3194/2022*** and judgment of the Supreme Court of India in the matter of ***Vishwakalyan Multistate Credit Co. Op. Soceity Ltd. Vs. ONEUP Entertainment Private Limited*** dated ***21.08.2023*** in ***Criminal Appeal No.2484/2023***.

6. Per contra, Mr. Dodiya, learned Advocate appearing for the respondent vehemently submits that the petitioner resides within Jalgaon District. The Magistrate would have jurisdiction over entire District in terms of Section 14(2) of the Criminal Procedure Code. The mandate under Section 202 of the Criminal Procedure Code would apply only when the accused resides beyond territory of district. He would further contend that Magistrate has applied his mind to the contents of the complaint duly supported by verification affidavit alongwith documentary evidence tendered into service. As such, text of the order resembles with the enquiry contemplated under Section 202 of the Criminal Procedure Code. He would further point out that in pursuance of the service of summons, the petitioner caused his appearance before the Magistrate. His plea has

1 **2021 ALL MR (Cri.) 3409.**
2 **2022 All M.R. (Cri.) 3310.**

been recorded. Therefore, at this stage no interference needs to be caused in exercise of Writ jurisdiction of this Court. The Trial Court as well as Court of Revision has taken pragmatic view of the matter and issued process, which need not be disturbed in exercise of Writ jurisdiction of this Court. To buttress his contentions, he would rely upon the observations of Full Bench of Supreme Court of India in ***Suo Motu Writ Petition (Cri.) No.2/2020***[3]. He would further rely upon the observations of the Supreme Court of India in the matter of ***Sunil Todi & ors. Vs. State of Gujarat & Anr.*** dated ***03.12.2021*** in ***Criminal Appeal No.1446/2021***, judgment of this Court in the matter of ***Prakash Nanji Thakkar Vs. State of Maharashtra and Another***[4], ***Blackburn Metals Vs. M/s. Zep Engineering Works and Ors.***[5] and judgment of the Calcutta High Court in case of ***Pawan Kumar Agarwal Vs. The State of West Bengal and Ors.***[6].

7. Having considered submissions advanced, the issue that arises for consideration in this matter is as to whether the impugned order passed by the Magistrate thereby issuing process against the petitioner is sustainable in law, particularly in terms of mandate of Section 202 of the Criminal Procedure Code. The amended provisions of Section 202 of the Criminal Procedure Code are introduced by Act of 25 of 2005 with effect from 26.06.2006 which mandate that Magistrate, in case where accused is residing beyond area of his jurisdiction shall postpone issuance of process so as to enquire into the case himself or direct an investigation by police officer or by other person. The

3 **AIR 2021 SC 1957.**
4 **(2020) 2 Mah LJ 394.**
5 **2022 (5) Mh.LJ 475.**
6 **MANU/WB/1985/2023.**

rational for the said amendment is wisdom of Parliament to avoid false prosecution filed against persons residing at far of places. Section 202 of the Criminal Procedure Code states as under:

*"**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, 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 exclusivelyby 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

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness 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"

8. The Supreme Court of India in ***Suo Motu Writ Petition No.2/2020*** considered the scope of enquiry under Section 202 of the Criminal Procedure Code, particularly in reference to the complaints under Section 138 of the Negotiable Instrument Act and in paragraph no.24 laid down

upshot of conclusions. The second and third clauses of the concluding paragraphs are relevant for the issue at hand, which reads as under :

> *"2. Inquiry shall be conducted on receipt of complaints Under Section 138 of the Act to arrive at sufficient grounds to proceed against the Accused, when such Accused resides beyond the territorial jurisdiction of the court.*
>
> *3. For the conduct of inquiry Under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses."*

9. The aforesaid mandate is re-affirms by the Supreme Court of India in case of ***Sunil Todi*** (supra). It is accordingly observed that if the Magistrate holds an enquiry himself, it is not compulsory that he should examine witnesses and in suitable cases the Magistrate can examine documents to be satisfied that there are sufficient ground for proceeding under Section 202 of the Criminal Procedure Code. Keeping in mind the aforesaid observations of the Supreme Court of India, if the impugned order is perused, it is evident that the learned Magistrate perused the documents and formed an opinion that *prima facie* offence under Section 138 of the Negotiable Instrument Act has been made out. However, opinion is neither preceded by enquiry as contemplated under Section 202 of the Criminal Procedure Code nor are reasons assigned to dispense with the same. Admittedly, the complainant is not examined before the Magistrate nor his evidence affidavit was tendered into service. The issuance of process appears to be based on contents of the complaints supported by verification affidavit and documents tendered into service.

10. Although examination of all the witnesses is not required to comply the mandate under Section 202 of the Criminal Procedure Code, the minimal requirement of tendering evidence affidavit of the complainant, consideration of the documents making out offence under Section 138 of the Negotiable Instrument Act or assignment of the requisite reasons for dispensing with the detailed enquiry would still be necessary where accused resides beyond jurisdiction of the Magistrate. This Court in case of ***Shivshankar Shrikushna Dhole*** (supra) observed that merely reading of the complaint and verification statement on oath given by the complainant while issuing process would not constitute sufficient compliance with mandatory requirement of Section 202 of the Criminal Procedure Code, particularly in the teeth of law laid down by the Supreme Court of India in Constitution Bench judgment. Similar view is taken in case of ***Sayed Mohammed Omair Sayed Ibrahim and Others*** (supra). This Court observed that although offence under Section 138 of the Negotiable Instrument Act depends upon the documents, the proof requires examination of the witnesses. Even the Magistrate is left with discretion to dispense with the enquiry, he should assign reasons for the same as to why he is restricting himself to the examination of the documents. Keeping in mind the aforesaid observations of this Court, if the impugned order is examined, apparently it sans requisite reasons for dispensing with the enquiry. Resultantly, the order impugned bereft of mandate under Section 202 of the Criminal Procedure Code.

11. The second limb of the argument advanced on behalf of the respondent is that the learned Magistrate has recorded plea of the petitioner on 30.12.2019, therefore, at this stage indulgence of this Court in Writ jurisdiction is not warranted. However, as observed in the aforesaid paragraphs, the mandate under Section 202 of the Criminal Procedure Code has been ignored by the Magistrate while passing order of issuance of process. The non-observance of the aforesaid mandate would vitiates the order. Therefore, merely because on appearance of the accused, plea is recorded, impugned order cannot be be perpetuated. It is pertinent to note here that before recording the plea of the accused, he had approached the Sessions Judge by filing Criminal Revision, thereby raising challenge to issuance of process with specific objection that the order is bereft of mandate under Section 202 of the Criminal Procedure Code. The respondents seeks to rely upon the judgment of this Court in case of ***Prakash Nanji Thakkar*** (supra). However, in that case after recording plea of the accused, the evidence of the witnesses was already tendered and the complainant was cross-examined. In that scenario, this Court declined to cause interference in the order of issuance of process in exercise of inherent powers under Section 482 of the Criminal Procedure Code. Similarly, the observations in the ***Balckburn Metals*** (supra) would not assist the respondents to carry forward their submissions.

12. The third contention raised on behalf of the respondents that the Magistrate exercises jurisdiction over entire district is wholly misconceived. The local jurisdiction of the Judicial Magistrate is subject to the control of the High Court and local limits of the areas within which Magistrate

appointed may exercise powers are defined. It is not disputed before this Court that Judicial Magistrate First Class at Jalgaon exercise it's powers within the limit of Jalgaon Taluka and Magistrates are appointed at every such Talukas for exercise of jurisdiction within such local limits. Sub-Section (2) of Section 14 of the Criminal Procedure Code is the general provision, which is subject to the control of the High Court or local limits of areas defined by the Chief Judicial Magistrate.

13. Resultantly, the following order is passed.

O R D E R

I. The Criminal Writ Petitions are allowed in terms of prayer Clauses (B) and (C) with further direction that :-

i. the Magistrate shall proceed from the stage of Section 202 of the Criminal Procedure Code.

ii. The learned Magistrate may conduct the enquiry under Section 202 of the Criminal Procedure Code.

iii. The evidence of the witnesses on behalf of the complainants may be permitted to be taken on affidavit.

iv. The Magistrate may or restrict the enquiry to the examination of the documents without insisting for examination of the witnesses by assigning adequate reasons for dispensing with the enquiry.

14. The procedure under Section 202 of the Criminal Procedure Code shall be conducted as expeditiously as possible and in any event within a period of one month from the date of receipt of this order.

15. Writ Petitions are disposed of accordingly.

(S. G. CHAPALGAONKAR)
JUDGE

Devendra/December-2023