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IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

HON'BLE JUSTICE SRI RAKESH THAPLIYAL.

09th September 2024

Criminal Misc. Application (C482) No. 347 of 2024

Dr. Rakesh Chandra Rastogi Applicant
Versus
State of Uttarakhand and others Respondents.
With

Criminal Misc. Application (C482) No. 345 of 2024

Dr. Rakesh Chandra Rastogi Applicant
Versus
State of Uttarakhand and others Respondents.
With

Criminal Misc. Application (C482) No. 346 of 2024

Dr. Rakesh Chandra Rastogi Applicant
Versus
State of Uttarakhand and others Respondents.
With

Criminal Misc. Application (C482) No. 348 of 2024

Dr. Rakesh Chandra Rastogi Applicant
Versus
State of Uttarakhand and others Respondents.
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Criminal Misc. Application (C482) No. 349 of 2024

Dr. Rakesh Chandra Rastogi Applicant
Versus
State of Uttarakhand and others Respondents.
With

Criminal Misc. Application (C482) No. 350 of 2024

Dr. Rakesh Chandra Rastogi Applicant
Versus
State of Uttarakhand and others Respondents.
With

Criminal Misc. Application (C482) No. 351 of 2024

Dr. Rakesh Chandra Rastogi Applicant
Versus
State of Uttarakhand and others Respondents.
With

Criminal Misc. Application (C482) No. 352 of 2024

Dr. Rakesh Chandra Rastogi Applicant
Versus
State of Uttarakhand and others Respondents.



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With
Criminal Misc. Application (C482) No. 353 of 2024
Dr. Rakesh Chandra Rastogi Applicant
Versus
State of Uttarakhand and others Respondents.

With
Criminal Misc. Application (C482) No. 354 of 2024
Dr. Rakesh Chandra Rastogi Applicant
Versus
State of Uttarakhand and others Respondents.

With
Criminal Misc. Application (C482) No. 355 of 2024
Dr. Rakesh Chandra Rastogi Applicant
Versus
State of Uttarakhand and others Respondents.

With
Criminal Misc. Application (C482) No. 361 of 2024
Dr. Rakesh Chandra Rastogi Applicant
Versus
State of Uttarakhand and others Respondents.

With
Criminal Misc. Application (C482) No. 362 of 2024
Dr. Rakesh Chandra Rastogi Applicant
Versus
State of Uttarakhand and others Respondents.

With
Criminal Misc. Application (C482) No. 815 of 2024
Modinagar Paper Mills Ltd. and others Applicants
Versus
State of Uttarakhand and others Respondents.

With
Criminal Misc. Application (C482) No. 335 of 2024
Modinagar Paper Mills Ltd. and others Applicants
Versus
State of Uttarakhand and others Respondents.

And
Criminal Misc. Application (C482) No. 691 of 2024
Modinagar Paper Mills Ltd. and others Applicants
Versus
State of Uttarakhand and others Respondents.

Counsel for the Applicant: Mr. Aditya Singh and Mr. S.S. Chauhan, learned counsel.

Counsel for the State: Mr. Pratiroop Pandey and Mr. B.C. Joshi, learned A.G.A.



Counsel for the private respondent:

Mr. Parikshit Saini, learned counsel.

1. In all these applications, preferred under Section 482 Cr.P.C., since identical question of law is involved, therefore, with the consent of the learned counsel for the parties, same are being decided by a common judgment.
2. The common question of law which is involved in all these matters, namely, “whether an inquiry under Section 202 Cr.P.C. is followed or not and either are mandatory or directory in nature in view of the judgment rendered by the Constitutional Bench of the Hon’ble Apex Court in **“Expeditious Trial of Cases under Section 138 of N.I. Act 1881, i.e., Suo Motu Writ Petition (Criminal) No. 2 of 2020, (2021) 16 SCC 116.”**
3. Before giving answer to the question of law as above, in all these cases the proceedings under Section 138 of N.I. Act has been challenged only on the ground that before taking cognizance on the complaint and issuing process and summoning the accused, mandatory inquiry as stipulated under Section 202(1) Cr.P.C., has not been followed which in fact mandates postpone of issuance of process for the accused resides outside the territorial jurisdiction of the Magistrate.
4. The counsel for the respondent has not disputed this fact that the present applicants, against whom the complaint has been filed under Section 138 of the N.I. Act, are residing outside the territorial jurisdiction of the Trial Court which took cognizance on the complaint.



5. Learned counsel for the applicants in answer to the question as above, placed reliance upon the judgment rendered by the Hon'ble Apex Court in ***Suo Motu Writ Petition (Criminal) No. 2 of 2020 (Supra)*** and submits that as per the law laid by the Hon'ble Apex Court, the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot be dispensed with. At this juncture, it is necessary to reproduce Section 202(1) Cr.P.C.

“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, 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.”*

6. The issue whether before issuance of summons to the accused residing outside the jurisdiction of the court can be dispensed with in a proceeding under Section 138 of the N.I. Act has been dealt with in ***Suo Motu Writ Petition (Criminal) No. 2 of 2020 (Supra)***, in paras. 10, 11 and 12 and the same are being reproduced herein below.

10. Section 202 of the Code confers jurisdiction on the Magistrate to conduct an inquiry for the purpose of deciding whether sufficient grounds justifying the issue of process are made out. The amendment to Section 202 of the Code with effect from 23.06.2006, vide Act 25 of 2005, made it mandatory for the Magistrate to conduct an



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*inquiry before issue of process, in a case where the accused resides beyond the area of jurisdiction of the court. (See: **Vijay Dhanuka & Ors. v. Najima Mamta & Ors.** ¹, **Abhijit Pawar v. Hemant Madhukar Nimbalkar and Anr.** ² and **Birla Corporation Limited v. Adventz Investments and Holdings Limited & Ors.** ³). There has been a divergence of opinion amongst the High Courts relating to the applicability of Section 202 in respect of complaints filed under Section 138 of the Act. Certain cases under Section 138 have been decided by the High Courts upholding the view that it is mandatory for the Magistrate to conduct an inquiry, as provided in Section 202 of the Code, before issuance of process in complaints filed under Section 138. Contrary views have been expressed in some other cases. It has been held that merely because the accused is residing outside the jurisdiction of the court, it is not necessary for the Magistrate to postpone the issuance of process in each and every case. Further, it has also been held that not conducting inquiry under Section 202 of the Code would not vitiate the issuance of process, if requisite satisfaction can be obtained from materials available on record.*

11. The learned Amici Curiae referred to a judgment of this Court in **K.S. Joseph v. Philips Carbon Black Ltd & Anr.** ⁴ where there was a discussion about the requirement of inquiry under Section 202 of the Code in relation to complaints filed under Section 138 but the question of law was left open. In view of the judgments of this Court in **Vijay Dhanuka** (supra), **Abhijit Pawar** (supra) and **Birla Corporation** (supra), the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot be dispensed with. The learned Amici Curiae recommended that the Magistrate should come to a conclusion after holding an inquiry that there are sufficient grounds to proceed against the accused. We are in agreement with the learned Amici.

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



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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.

7. In para 12 of the said judgment, the interpretation of Section 202 (2) Cr.P.C has been dealt with which stipulates that the Magistrate shall take evidence of the witness on oath in an inquiry conducted under Section 202(1) Cr.P.C. for the purpose of issuance of process and it has been held that on a holistic reading of Section 145 along with Section 202 (1) and 202 (2) of the Code, the same is not applicable to a complaint under Section 138 of the N.I. Act. In respect of examination of witness on oath and the evidence of witness on behalf of the complainant, same shall be permitted on affidavit.

8. The issue in these applications are only confined to the inquiry under Section 202(1) Cr.P.C., and undisputedly, the inquiry as stipulated under Section 202 Cr.P.C., in view of the answer given by the Constitutional Bench of the Apex Court in the aforesaid case in para 10 and 12, the inquiry cannot be dispensed with before issuance of summons to the accused residing outside the jurisdiction of the court, therefore, in view of the law laid down by the Hon'ble Apex Court, it is mandatory.



9. The Hon'ble Apex Court in ***Suo Motu Writ Petition (Criminal) No. 2 of 2020 (Supra)*** after thorough discussion draw the conclusion in para 24, which is being reproduced herein below:-

24. The upshot of the above discussion leads us to the following conclusions:

1) The High Courts are requested to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 of the Act from summary trial to summons trial.

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.

4) We recommend that suitable amendments be made to the Act for provision of one trial against a person for multiple offences under Section 138 of the Act committed within a period of 12 months, notwithstanding the restriction in Section 219 of the Code.

5) The High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonour of cheques issued as part of the said transaction.

6) Judgments of this Court in Adalat Prasad (supra) and Subramaniam Sethuraman (supra) have interpreted the law correctly and we reiterate that there is no inherent power of Trial Courts to review or recall the issue of summons. This does not affect the power of the Trial Court under Section 322 of the Code to revisit the order of issue of process in case it is brought to the court's notice that it lacks jurisdiction to try the complaint.

7) Section 258 of the Code is not applicable to complaints under Section 138 of the Act and findings to the contrary in Meters and Instruments (supra) do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the Trial Courts to reconsider/recall summons in respect of complaints under Section 138 shall be considered by the Committee constituted by an order of this Court dated 10.03.2021.

8) All other points, which have been raised by the Amici Curiae in their preliminary report and



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written submissions and not considered herein, shall be the subject matter of deliberation by the aforementioned Committee. Any other issue relating to expeditious disposal of complaints under Section 138 of the Act shall also be considered by the Committee.

10. In support of his arguments, learned counsel for the applicant further placed reliance in another judgment of Bombay High Court in Criminal Application No. 1344 of 2010, **Bansilal S. Kabra vs. Global Trade Finance Limited and Anr., 2024: BHC-AS:5506-FB** decided on 16.01.2024, wherein the judgment rendered by the Constitutional Bench of Hon'ble Apex Court in ***Suo Motu Writ Petition (Criminal) No. 2 of 2020 (Supra)*** has been followed. The relevant paras of the judgment are being reproduced herein below:-

“4 Another aspect, in order to curtail the delays in conclusion of the trials under the Act of 1881, which was adverted to, is in relation to interpretation of Section 202(2) of the Code, which expected the Magistrate to record evidence of the witness on oath, in an inquiry to be conducted u/s.202(1), before issuance of the process, and though in the present reference, we are not concerned with the said issue, we must note that, on this aspect, the Apex Court has held, that in the wake of Section 145 of the Act, the evidence of witness on behalf of the complainant, shall be permitted on affidavit and there is no reason for insisting on the evidence on oath. Thus, if the Magistrate prefers to an inquiry himself, it shall not be imperative for him to examine the witness on oath and in suitable cases, he may examine the documents for satisfying himself, as to the sufficiency of the grounds for proceeding u/s.202 of the Code.

5 Though the above conclusions drawn in the suo motu Writ Petition, are touching the cases under Section 138 of the Negotiable Instruments Act, 1881, at a subsequent point of time and to be precise on 23/9/2021, the Criminal Appeal filed in the present proceedings, was heard along with the group of appeals and the question involved in the matters, namely, whether an inquiry u/s.202 of the Cr.P.C, is mandatory or directory in nature, came to be answered by specifically reproducing, paragraphs 10 to 12 of the Constitution Bench Judgment, in suo motu Writ Petition No.2 of 2020 (AIR 2021, Supreme Court 1957), and since the issue raised in this regard, was already settled, each individual matter was left open to the discretion of the concerned Magistrate(s) to decide, as to what type of procedure they need to adopt in the complaints, pending adjudication before



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them, where the accused persons are located outside their territorial jurisdiction, and the Criminal Appeals were disposed off.

6 In order to have implementation of the orders issued by the Constitution Bench in suo motu Writ Petition dated 16/4/2021, the Registrar General of the Bombay High Court has also issued a circular on 27/1/2022, clearly issuing the following directions:-

"2 On receipt of any complaint under Section 138 of N.I. Act, wherever it is found that any accused is resident of the area beyond the territorial jurisdiction of the magistrate concerned, an inquiry shall be conducted by the magistrate to arrive at sufficient grounds to proceed against the accused as prescribed under Section 202 of Cr.P.C.

3 While conducting any such inquiry under section 202 of Cr.P.C, the evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the magistrate may restrict the inquiry to examination of documents without insisting for examination of witnesses for satisfaction as to the sufficiency of grounds for proceeding under the said provision".

7 In our considered view, the question, referred to the larger Bench, is already answered by the Constitution Bench of the Apex Court as above, and therefore, we do not deem it necessary to answer the reference.

However, we would like to only add, by taking note, that Chapter XV of the Code, which contemplates complaints to the Magistrate, which includes Section 202, intended to achieve twin objects; one being to enable the Magistrate to carefully scrutinize the allegations made in the complaint with a view to prevent a person named therein, as accused from being called upon to face unnecessary, frivolous or meritless complaint; and the other, to find out whether there is any material in existence, to support the allegations in the complaint. The Magistrate is therefore, duty bound to elicit all facts, having regard to the Tilak 7/9 APPLN 344-10.doc interest of the complainant, in absence of the accused, before he brings to book him for the accusations in the complaint. For forming an opinion to that effect, the Magistrate may himself hold an inquiry u/s. 202 of the Code, or direct investigation to be made by a police officer.

We may also add that in a contingency, when he decides to conduct an inquiry, specifically against the persons residing outside his territorial jurisdiction, the inquiry must be aimed at ascertaining the truth or otherwise in the allegations made in the complaint. It is expected that the Magistrate shall not only rely upon the averments in the complaint, as it may many a times, contain unfounded allegations which require ascertaining of its veracity, before the process is issued, so as to separate the chaff from the grain.



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Before the Magistrate acts on the complaint, by issuing process against the person named as an accused therein, he shall satisfy himself about the existence of sufficient ground(s), for proceeding against him, particularly when he is residing outside his jurisdiction. The amended provision is aimed to prevent innocent persons residing at far places, from harassment by unscrupulous persons, filing unfounded and false complaints.

This would necessarily involve recording of statement of the complainant on oath, in form of verification statement or recording evidence of any witnesses produced by the complainant, in support of the allegations in the complaint, to find out whether a prima facie case for issuance of process has been made out.

We must, however, clarify that this inquiry is restricted to, ascertaining the element of truth or falsehood of the allegations in the complaint, based on the material placed by the complainant before the Court, and the inquiry is limited only to this extent i.e. to find out, if there is any matter which calls for investigation.

8 Summoning of an accused in a criminal case, is a serious matter and it certainly cannot be a perfunctory exercise. The amendment introduced in the Code therefore, contemplates that a Magistrate shall examine the nature of allegations in the complaint and take into account the evidence, both oral and documentary, to find out if it is sufficient for the complainant to succeed in establishing the charge against the accused, and justify the issuance of process against him. It is nonetheless the duty of the Magistrate to prima facie find out, if the case is made out by the complainant against the accused before the process is issued, so as to avoid any frivolous or vexatious claims being taken forward by the Magistrate. Only on being satisfied that the offence is made out against the person(s) named in the complaint, the process would be issued and at this stage, all the relevant facts and circumstances shall be taken into consideration before issuing process, lest it would be an instrument in the hands of a private complainant, as vendetta to harass the named accused. Vindication of majesty of justice and maintenance of law and order in the Society, being the primary object of criminal justice, would not bring within its sweep, a personal vengeance.

11. On the other hand, Mr. Parikshit Saini, learned counsel for the respondent placed before this Court the judgment rendered by the Coordinate Bench of this Court in Criminal Revision No. 108 of 2018, Prem Sing Dhingra vs. State of Uttarakhand and anr., decided on 27.02.2024.



12. I perused the said judgment. However, the judgment rendered by the Coordinate Bench is on different footing, since, the only question before the Coordinate Bench was the question of jurisdiction of the court concerned with regard to the complaint under Section 138 of the N.I. Act which in fact was resolved by way of amendment w.e.f. 15.06.2015 in Section 142(2) of the N.I. Act.

13. Here the issue, which is involved in all these applications are on different aspects, i.e, with regard to the provision of inquiry as contemplated under section 202(1) Cr.P.C. and in view of the judgment rendered by the Constitutional Bench of the Hon'ble Apex Court in ***Suo Motu Writ Petition (Criminal) No. 2 of 2020 (Supra)*** the inquiry as contemplated under Section 202(1) Cr.P.C. is mandatory and such an inquiry cannot be dispensed with.

14. Another judgment which has been relied by Mr. Parikshit Saini is in the case of **S.P. Mani and Mohan Dairy vs. Dr. Snehlatha Elangovan, (2023) 10 SCC 685** but again the said judgment is not applicable to the issue involved in this bunch of applications preferred under Section 482 Cr.P.C. Lastly, Mr. Parikshit Saini, learned counsel for the respondent submits that there is no specific pleading with regard to the fact whether before issuing process on the complaint under Section 138 of the N.I. Act an inquiry as stipulated under Section 202(1) Cr.P.C., has been followed or not.



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15. It appears that Mr. Parikshit Saini, learned counsel has not gone through with the supplementary affidavit filed by the applicant in C482 No. 347 of 2024 on 16.03.2024, wherein categorical statement has been given that there is no mandatory compliance of Section 202(1) Cr.P.C. which is evident from the summoning order. Even otherwise, on perusal of the summoning order it appears that there is no reference whether any such inquiry has been held or not which, in fact, is mandatory in nature.

16. After hearing learned counsel for the parties, this Court is of the view that since inquiry as stipulated under Section 202(1) Cr.P.C., has not been followed before issuing the process on the complaint under Section 138 of the N.I. Act by the Trial Court, therefore, the summoning orders passed by the court below are hereby set aside. The matters are remanded back to the Trial Court for proceeding afresh from the stage of inquiry as contemplated under Section 202(1) Cr.P.C.

17. As in all these cases complaints were filed in the year 2023, and as per the mandate of Section 143 of the N.I. Act, every such complaint has to be decided within a period of 6 months, therefore, the Trial Court is directed to conduct an inquiry under Section 202 Cr.P.C. on the complaint preferred under Section 138 of the N.I. Act and decide on the issuance of process at the earliest preferably within 6 weeks from the date of communication of this order and thereafter to conclude the proceeding as expeditiously as possible without granting unnecessary adjournment to either of the parties.



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18. In view of the above observations as above, all the applications preferred under Section 482 Cr.P.C. are disposed of finally.

19. Let a copy of this judgment be placed in each of the applications.

RAKESH THAPLIYAL, J.

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