

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 791 OF 2015

SHOBHABAI W/O GANGADHAR JAKARE AND ANOTHER
-VERSUS-
THE STATE OF MAHARASHTRA & ANOTHER

...
Advocate for Petitioners : Shri Venjane Tukaram M.
APP for Respondent No.1/ State : Shri S.N.Kendre.
...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 06th June, 2016

Oral Order:

1 This Court (Coram : T.V.Nalawade, J.) by it's order dated 01.07.2015 had stayed the proceedings in SCC No.196/2014 pending before the Court of the learned Judicial Magistrate First Class, Biloli by passing the following order:-

- “1. Notice. Learned Additional Public Prosecutor waives notice for respondent No.1. Notice to respondent No.2 is made returnable on 05th August, 2015.
2. Learned counsel for the petitioners argued for interim stay of the proceeding on the ground that inquiry as required under section 202 of the Code of Criminal Procedure was not made even when the present petitioners, accused are not residing within local jurisdiction of the learned Judicial Magistrate. In view of this submission stay is granted to the proceedings of SCC No.196/2014 pending in the Court of the learned Judicial Magistrate First Class till next date.”

2 Respondent No.2, who is the Complainant in SCC No.196/2014, has chosen not to cause an appearance either through an Advocate or in person despite service of the court notice which was issued on 01.07.2015.

3 Shri Venjane, learned Advocate for the Petitioners, submits that Respondent No.2 has lodged a complaint on 12.09.2014 under Sections 294, 323, 506 r/w 34 of the Indian Penal Code against the Petitioners and Mr.Kailash Ramrao Kotwale. Mr.Kotwale is not party to the present proceedings.

4 The learned Advocate submits that though allegations have been made against the Petitioners along with Mr.Kotwale, no allegations have been set out in the verification dated 12.09.2014 before the learned Court so as to make out any case against the Petitioners. Yet, process has been issued against the Petitioners vide the impugned order dated 18.09.2014.

5 He further submits that the Petitioners reside beyond the territorial jurisdiction of the learned Court and as such, the process could not have been issued against the Petitioners without conducting an enquiry under Section 202 of the Code of Criminal Procedure.

6 Shri Venjane places reliance upon the judgment of this Court in the matter of *Vimal Powerloom vs. Ravi Agency*, 2014 All M.R. (Cri.) 1696, to support his contention that the Honourable Supreme Court as well as this Court have consistently held that unless an enquiry is conducted under Section 202 of the Code of Criminal Procedure in view of the amended portion brought into effect from 23.06.2006, 'Process' could not have been issued against the Petitioners.

7 He, therefore, submits that the order of issuance of process dated 18.09.2014 passed by the learned Court deserves to be quashed and set aside as against the Petitioners.

8 The learned APP has opposed this petition by contending that the issuance of process by the competent court indicates that it has gone through the complaint and the verification of the complainant and has ordered issuance of process by applying its mind to the accusations made against the Petitioners. He submits that just because an enquiry was not conducted under Section 202, the impugned order need not be interfered with.

9 I have considered the submissions of the learned Advocates.

10 Section 202 of the Code of Criminal Procedure reads 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, *[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 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. ”

** Inserted by Act 25 of 2005, S.19 (w.e.f.23.06.2006).*

11 The contention of the Petitioners is that as the Petitioners are residing beyond the area in which the learned Court could exercise its jurisdiction, an enquiry under Section 202 would be necessary and significant. From the impugned order, I do not find that the learned Court has applied its mind to the territorial jurisdiction vested in it by law and as to whether, the Petitioners, who are accused persons, are residing beyond the area in which the learned Court exercised its jurisdiction.

12 The Honourable Supreme Court in the matter of *National Bank of Oman vs. Barakara Abdul Aziz*, **(2013) 2 SCC 488**, considered the issue as to whether, it was incumbent upon the Magistrate to conduct an enquiry or order an investigation under Section 202 of the Code of Criminal Procedure (amended Section 202) before issuing process in the matter. So also, the Honourable Apex Court has considered the aspect as to whether such a complaint, in which the accused resides beyond the area over which the Magistrate concerned exercises jurisdiction, should be quashed or whether, the matter deserves to be remitted to the Magistrate for passing fresh orders by following the provisions of Section 202.

13 The Honourable Supreme Court concluded in the above said case that where an accused resides beyond the area over which a

Magistrate concerned exercises its jurisdiction, it is incumbent upon the Magistrate to carry out an enquiry or order an investigation before issuing process. It was held that there was an obligation on the Magistrate to find out whether, the matter calls for investigation. It would be apposite to reproduce the conclusions of the Honourable Supreme Court in paragraphs 8, 9, 11 and 12 of *National Bank of Oman judgment (supra)* as under:-

- “8. We find no error in the view taken by the High Court that the C.J.M. Ahmednagar had not carried out any enquiry or ordered investigation as contemplated under Section 202 of the Cr.P.C. before issuing the process, considering the fact that the respondent is a resident of District Dakshin Kannada, which does not fall within the jurisdiction of the C.J.M. Ahmednagar. It was, therefore, incumbent upon him to carry out an enquiry or order investigation as contemplated under Section 202 of the Cr.P.C. before issuing the process.
9. The duty of a Magistrate receiving a complaint is set out in Section 202 of the Cr.P.C. and there is an obligation on the Magistrate to find out if there is any matter which calls for investigation by a criminal court. The scope of enquiry under this Section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. Investigation under Section 202 of the Cr.P.C. is different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient grounds for him to proceed further. The scope of enquiry under Section 202 of the Cr.P.C. is, therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint :-
 - (i) on the materials placed by the complainant

before the Court;

(ii) for the limited purpose of finding out whether a *prima facie* case for issue of process has been made out; and

(iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have.

10.

11. We are of the view that the High Court has correctly held that the above-mentioned amendment was not noticed by the C.J.M. Ahmednagar. The C.J.M. had failed to carry out any enquiry or ordered investigation as contemplated under the amended Section 202 of the Cr.P.C. Since it is an admitted fact that the accused is residing outside the jurisdiction of the C.J.M. Ahmednagar, we find no error in the view taken by the High Court.

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.”

14 In the judgment delivered in *Vimal Powerloom (supra)*, this

Court has observed in paragraphs 3 and 5 as under :-

“3. It was submitted for the accused/petitioner that no inquiry or investigation as required in amended provision of section 202 of Cr.P.C. is made by the J.M.F.C. He relied on some reported cases, which include the case reported as (2013) 2 SCC 488, [*National Bank of Oman Vs. Barakara Abdul Aziz*].

He has relied on some orders made by this Court also in respect of amended provision of section 202 of Cr.P.C. Almost all the Courts have held that the provision of section 202 of Cr.P.C. as amended is mandatory in nature.

4.

5. *The various decisions rendered by this Court show that this Court has held that the provision of section 202 as amended is mandatory in nature. Thus, the Courts are following the amended provision in this State. In the case of Oman Bank cited supra, it is laid down that it is mandatory provision and procedure needs to be followed by J.M.F.C. In view of this position of law, this Court holds that the order of issue process passed by the J.M.F.C., without following the aforesaid procedure cannot sustain in law. The Magistrate needs to follow the procedure with only object, to ascertain the truth in the allegations made and only prima facie case is required to be made out. The scope of the inquiry under section 202 of Cr.P.C. is very limited. He is also required to keep in mind the relevant provisions of Negotiable Instruments Act like sections 118 and 139 raise some presumptions. The witnesses like Bank Officers are not required to be examined to prove bank documents. Similarly, in respect of other evidence, the postal endorsement on the notice, there are presumptions under section 27 of General Clauses Act and those presumptions can be kept in mind by the J.M.F.C. Thus, the scope of inquiry, which may be made by J.M.F.C. is very limited. In such a case to send the matter to police even for limited purpose of investigation is not desirable. In view of these circumstances and position of law, this Court holds that the matter needs to be remanded back by allowing the present writ petition.”*

15 From the above, it is evident that an enquiry under Section 202 pursuant to the amendment inserted by the Act No.25/2005 would

become necessary in a case where the accused could be said to be residing at a place which is beyond the area in which the learned Court exercises its jurisdiction. The Trial Court having failed to conduct such an enquiry before passing the impugned order, in my view, therefore, calls for an interference in the impugned order.

16 However, it cannot be ignored that Accused No.3 (Mr.Kotwale) has not chosen to assail the impugned order.

17 In the light of the above, this Criminal Writ Petition is partly allowed. The impugned order dated 18.09.2014 passed by the learned Judicial Magistrate First Class, Biloli in SCC No.196/2014 is quashed and set aside to the extent of the Petitioners alone. The matter is, therefore, remitted back to the learned Trial Court in order to enable the Court to follow the procedure as is laid down under Section 202 of the Code of Criminal Procedure before passing any order. Needless to state, the Trial Court shall keep in view the observations of the Hon'ble Apex Court set out in paragraphs 8, 9, 11 and 12 reproduced above.