

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

CRIMINAL APPLICATION NO.5221 OF 2014

Sanjay Shriramchandra Tiwari
Age: 48 years, Occu.: Business,
R/o.B-8, Ashoka Garden,
Bhopal (Madhya Pradesh).

..Applicant

VERSUS

1) Sofiya Entertainment Pvt.Ltd.,
Through its Director & Owner,
Mr.Munir Kadar Shaikh,
Age: 46 years, Occu.: Business,
R/o.Altaf Majil, Near Kute Hospital,
Newasa Road, Shrirampur,
Tq.Shrirampur, Dist.Ahmednagar.

2) The State of Maharashtra ..Respondents

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CRIMINAL APPLICATION NO.5224 OF 2014

Sanjay Shriramchandra Tiwari
Age: 48 years, Occu.: Business,
R/o.B-8, Ashoka Garden,
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..Applicant

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Advocate for Applicant : Mr.Rahul A.Tambe
 Advocate for Respondent No.1 : Mr.Rajendra K.Temkar
 APP for Respondent No.2 : Mr.G.O.Wattamwar

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CORAM : PRAKASH D.NAIK, J.

DATE : 7th NOVEMBER, 2017

JUDGMENT:-

1) With the consent of both the parties, the applications were heard for final disposal.

2) In all these applications, the applicant is arraigned as accused in S.T.C.Nos.447 of 2011, 182 of 2012, 183 of 2012 and 184 of 2012. In all these complaints, the process was issued for the offence u/s 138 of the Negotiable Instruments Act. The complaints are pending before the Court of Judicial Magistrate First Class, Shrirampur.

3) The complaint alleges that the complainant is the owner and Director of Sofiya Entertainment Pvt.Ltd. The accused executed an agreement dated 25.11.2010 about the Advertising News and marketing in the territory of M.P. only. Rent of licence was fixed amounting to Rs.4,00,000/- per month. It is the case of the complainant that in discharge of the liability, the accused issued cheques, which is the subject matter of all these complaints. The cheques were deposited by the complainants, which were dishonoured on account of insufficient funds. The demand notice was issued and thereafter complaints were filed. After recording verification statement, the process was issued.

4) The applicant preferred revision applications before the Court of Sessions challenging the order of process. The revision applications were dismissed.

5) The only point raised by the applicant challenging the order of process is that the Trial Court did not

conduct the enquiry u/s 202 of the Code of Criminal Procedure. It is submitted that the complaint was filed in the Court of Shrirampur and the accused was resident of Bhopal, Madhya Pradesh. It was therefore, imperative to conduct an enquiry contemplated u/s 202 of the Code of Criminal Procedure. It is submitted that the said provision mandates the enquiry on account of the fact that the accused is residing beyond the jurisdiction of the Court. It is submitted that the accused is residing beyond the territorial jurisdiction of the Court is not in dispute. As per the amended provisions of Section 202 of the Code of Criminal Procedure, in a case where accused is residing at a place beyond the area of which Courts exercises jurisdiction, the Court has to postpone the issue of process against the accused and either enquire into the case himself or direct an investigation to be made by the 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. It is submitted that the enquiry provided under the said

provision is mandatory in nature and therefore order issuing process is bad in law.

6) The learned counsel for the applicant relied upon the following decisions in support of his submissions:-

(a) *Abhijit Pawar Vs. Hemant Madhukar Nimbalkar and Another [(2017) 3 Supreme Court Cases, 528]*.

(b) *K.T.Joseph Vs. State of Kerala & Anr. [2009(15) SCC, 199]*.

(c) *Vimal Powerlook Vs. Ravi Agency & Anr.[2014 ALL MR (Cri.) 1696]*.

(d) *Netcore Solutions Pvt.Ltd., & Ors. Vs. M/s.Pinnacle Teleservices Pvt.Ltd. & Ors. [2011 ALL MR (Cri), 3873]*.

(e) *Naresh Babulal Dholpuria & Ors. Vs. State of Maharashtra & Anr. [2014(3) Bom.C.R.(Cri.), 182]*

(f) *National Bank of Oman Vs. Barakara Abdul Aziz and Another [(2013) 2 Supreme Court Cases, 488]*

(g) *Sunil Jacob Vs. State of Kerala and Another [2008) 4*

KLT (SN39), 44]

(h) Muhammed Basheer and etc. Vs. The State of Kerala and Anr. [2009 Cri.L.J., 246]

7) The learned counsel for the respondent No.1 however strongly opposed the applications. It is submitted that the enquiry contemplated u/s 202 of Code of Criminal Procedure is not mandatory in nature qua the proceedings u/s 138 of the Negotiable Instruments Act. It is submitted that if the provision is made mandatory, it would defeat the very purpose of the prosecution u/s 138 of the Negotiable Instruments Act. The nature of the proceedings u/s 138 of the Negotiable Instruments Act are such that the complaint, documents annexed to the complaint and the verification statement would be sufficient to take cognizance of the complaint and there need not be any enquiry u/s 202 of the Code of Criminal Procedure in the eventuality that the accused is residing beyond the territorial jurisdiction of the Court.

8) The learned Counsel for the respondent No.1 relied upon the following decisions:-

(i) *Bansilal S.Kabra Vs. Global Trade Finance Ltd. & Anr. [2010(2) Bom.C.R.(Cri.), 754]*

(ii) *ASR Systems Pvt.Ltd. & Anr. Vs. Kimberly Clark Hygiene Products Pvt.Ltd. & Anr. [2012 ALL MR (Cri), 557].*

(iii) *Dr.(Mrs.) Rajul Ketan Raj Vs. Reliance Capital Ltd. & Anr., [2016 ALL MR (Cri), 1224]*

9) I have heard both the parties. According to me, the enquiry u/s 202 of the Code of Criminal Procedure in the event of accused residing beyond the territory of the Trial Court is not mandatory in relation to the proceedings u/s 138 of the Negotiable Instruments Act.

10) In the case of *Bansilal S.Kabra* (supra), this Court has taken a view that the said provision would not apply to the prosecution under the Negotiable Instruments Act and merely because the accused resides outside the

jurisdiction of the Court in each and every case, it is not necessary for the Magistrate to postpone the issuance of process. The Magistrate can exercise his discretion and decide to issue process and decide the complaint after verification, or postpone the issuance of process and in the given case hold a further enquiry depending upon the facts and circumstances of each case and non-compliance of such provision would not vitiate the issuance of process, if there is material to indicate that there is an application of mind on the part of the Magistrate after going through the verification and other material brought on record by the complainant.

11) While deciding the said issue, the Court in the above decision has also taken into consideration decision in the case of *Capt.S.C.Mathur Vs. M/s.Electronik Lab, [2010(2), Bom.C.R.(Cri.), 385]*. The learned Judge, therefore directed that the matter be placed before the Hon'ble Chief Justice for referring it to the larger Bench. The said decision was challenged before the

Supreme Court and from the order placed on record by learned counsel for the applicant, it appears that the proceedings are pending before the Apex Court. From the order, it appears that the leave was granted and hearing was expedited.

12) It is also apparent that in some of the decisions of this court placed on record by the learned counsel for the applicant, the Court has taken a view that it is mandatory to hold such an enquiry in compliance with Section 202 of the Code of Criminal Procedure in relation to the prosecution u/s 138 of the Negotiable Instruments Act.

13) In the case of *Abhijit Pawar* (supra) decided by the Apex Court, the Court had considered the scope of enquiry u/s 202 of the Code of Criminal Procedure. It is held that it is mandatory to hold such enquiry. Similar view was taken in the earlier decision of the Supreme Court in the case of *National Bank of Oman* (supra) while dealing

with the prosecution under the Indian Penal Code. The Supreme Court in the case of *K.T.Joseph* (supra) has taken similar view.

14) However, in several other decisions of this Court apart from the decision in the case of *Bansilal S.Kabra* (supra), the Court has reiterated the law laid down in the decision of *Bansilal Kabra* case. The said decisions are also placed on record by learned counsel for the respondent No.1, which are referred to herein above.

15) However, reference can be made to the decision of this Court in the case of *Dr.(Mrs.) Rajul Ketan Raj* (supra) wherein this Court has considered several decisions and dealt with the scope of Section 202 of the Code of Criminal Procedure and whether it is necessary to hold an enquiry u/s 202 in the circumstances enumerated herein above. The Court made reference to the decision of *Bansilal Kabra* (supra) as well as other decisions, which have taken a view that it is mandatory to hold such

enquiry and observed that the enquiry is not mandatory in nature. In the said decision, it was observed that plain reading of the provisions of the Negotiable Instruments Act indicates that Section 142 of the Negotiable Instruments Act underlines the procedure for taking cognizance of offences under the Act. Departing from general rule that the criminal law can be set in motion by any person either by written complaint or oral information, the provision of Section 142 of the Act mandates that the complaint u/s 138 of the Negotiable Instruments Act should be in writing and should be filled and signed by the payee or the holder in due course, as the case may be, before the concerned Court. Thus there is no scope to refer the case for police investigation or enquiry. The exception engrafted in section 142 serves as a safeguard against false and frivolous complaints and thus eliminates the need to hold a preliminary enquiry contemplated by Section 202 of the Code of Criminal Procedure.

16) In the said decision, the Court has also considered the fact that the decision of full Bench in the case of *Rajesh Chalke Vs. State of Maharashtra* [**2011(1) All MR, 893**] was not brought to the notice of the learned single Judge in the case of *Netcore* (**Cri.Writ Petition No.138 of 2011**) and the decisions in the case of *Indian Bank Association Vs. Union of India* [(**2014) All MR (Cri) 4178 (SC)**] as well as in the case of *Rajesh Chalke* (supra) was not brought to the notice in the case of *Vimal Powerloom*. It is further observed that the very purpose of the Act is defeated if the enquiry u/s 202 of the Code of Criminal Procedure is held to be mandatory in the complaint u/s 138 of the Negotiable Instruments Act. It was also observed that the pendency of reference before the larger Bench would not preclude the Court for following the Judgments under reference.

17) I do not find any reason to take a different view than the view expressed by the learned single Judge in the case of *Dr.(Mrs.) Rajul Ketan Raj* (supra).

18) I have already expressed my view in another decision in the case of *Vijay Tata Ravipati Vs. Mediascope Publicitas (India) Pvt.Ltd. (Criminal Application No.1248 of 2016)* wherein the aforesaid decision was followed by me and held that enquiry u/s 202 for the prosecution u/s 138 of the Negotiable Instruments Act is not mandatory.

19) In view of the above, the applications deserve to be dismissed. Hence, I pass the following order:-

ORDER

(I) Criminal Application Nos.5221 of 2014, 5222 of 2014, 5223 of 2014 and 5224 of 2014 stand dismissed.

(II) Applications stand disposed of.

[PRAKASH D.NAIK, J.]