

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

**CRIMINAL WRIT PETITION NO. 582 OF 2017**

- 1] Raj Buildhome Pvt. Ltd.,  
Registered under the Companies Act  
Ref. Off : 120, New Bohra Bazar,  
Hathipole, Udaipur-313001,  
Rajasthan,  
through its Directors,
- 2] Bherulal Gulabchand Nagda,  
Managing Director,  
Age 79 years, occ. Business,  
R/o 10, Shantivan, Fatehpura-Bedla  
Road, New Aalok School,  
Udaipur-313001, Rajasthan,
- 3] Ali Asgar Magar (Director),  
age 40 years, occ. Business,  
R/o 120, Pannadhay Marg,  
Hatipole, Udaipur-313001,  
Rajasthan,
- 4] Adil Mohsin Magar (Director),  
age 45 years, occ. Business,  
R/o Flat No. 3, Prime Vihar CHS Ltd.,  
Opp. Salunkhe Vihar Society,  
Kondhwa, Pune-411040,
- 5] Fida Hussain (Director),  
age 71 years, occ. Business,  
R/o 13, New Ashwani Bazar,  
Udaipur-313001, Rajasthan,
- 6] Imdad Hussain (Director),  
age 76 years, occ. Business,  
R/o Hitawala Ki Badi, Nar Tak  
Building, Kharol Colny,  
Udaipur-313001, Rajasthan,

7] Hussaini Magar (Director),  
age 71 years, occ. Business,  
R/o 9, 1C, Kharol Colny,  
Udaipur-313001, Rajasthan,

8] Saffudin Bohara (Director),  
age 68 years, occ. Business,  
R/o A to Z Explosives,  
Yadav Mohalla,  
Fatehnagar, Udaipur-313001,  
Rajasthan

...Petitioners  
(Orig.Accused)

VERSUS

Khozim Yusuf Nagarwala,  
age 49 years, occ. Nil,  
R/o Plot No. 3, Chowdhary Nagar,  
Kombdiwala Mala, Solapur Road,  
Ahmendagar

... Respondent

.....

Mr. S.S.Chapalgaonkar, advocate for the  
petitioners

Mr. N.B.Narwade, advocate for respondent

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**CORAM : K.L.WADANE, J.**

**Reserved on : 24.1.2018**

**Pronounced on : 06.2.2018**

**JUDGMENT :**

Rule. Rule returnable forthwith. With  
the consent of the learned counsel for the  
parties, Petition is taken up for final hearing.  
Heard learned counsel for the respective parties.

2. The order, passed by the learned Judicial Magistrate, First Class, Ahmednagar, below Exh.1 in Summary Criminal Case No. 414 of 2017, dated 21.1.2017 is challenged in this Writ Petition. By the said order, the process is issued against petitioners for the offence punishable under Section 138 of the Negotiable Instruments Act.

3. Brief facts of the case may be stated as follows :-

On 17.1.2017, respondent/original complainant had filed Summary Criminal Case No. 414 of 2017 in the Court of learned Judicial Magistrate, First Class, Ahmednagar for the offence punishable under Section 138 of the Negotiable Instruments Act. The complainant alleged that he is an automobile engineer having experience of more than 22 years and was doing job as a Manager-fleet at Abudhabi (UAE). Accused no.1 is a Registered Company. Accused no.4 is residing at Pune and having

friendly relations with the complainant. Respondent no.4 was having knowledge about complainant's job at Abudhabi and his salary for more than Rs.3.5 Lakh per month.

4. Complainant further alleged that thereafter accused no.4 met the complainant in the month of June, 2012. Thereafter accused no.4 informed the complainant that he and his 7 partners are developing the properties at Udaipur and Pune and are forming a Company. Thereafter accused nos. 2 to 8 impressed the complainant that they are already getting huge profit from their earlier investments. Therefore, the accused had requested the complainant to join them to develop company business and assured the complainant that they will pay Rs.Two Lakh fees per month minimum in addition to the profit percentage.

5. As per the assurance given by the accused, complainant, his wife and mother have invested an amount of Rs.Fifty Lakh and such amount was

transferred through R.T.G.S. from Ahmednagar to the Firm run by accused nos. 3 and 4 in their Bank accounts.

6. Since April, 2013, the complainant has demanded due amount from the accused on many times, but accused did not pay any amount. Thereafter, the accused agreed to pay the said amount and accordingly a cheque for Rs.1,58,27,634/-, dated 1.10.2016 was given to the complainant. The cheque was deposited in the Bank, however, same was returned unpaid with remark, "funds insufficient". Hence, according to the complainant, all the accused persons have committed offence punishable under Sections 138 r/w 141 of the Negotiable Instruments Act.

7. Upon presentation of the complaint, after perusal of the verification of the complainant, the learned Magistrate has issued process for the offence punishable under Section 138 of the Negotiable Instruments Act.

8. I have heard the arguments of Mr. S.S.Chapalgaonkar, learned counsel appearing for the petitioners/accused and Mr. N.B.Narwade, learned counsel appearing for the respondent/complainant.

9. Mr. Chapalgaonkar, learned counsel while canvassing concentrated his arguments on two points.

(1) All the petitioners are not signatory to the cheque, therefore, the process issued against the accused persons is incorrect.

(2) Since the case is filed by the complainant for the offence punishable under Section 138 of the Negotiable Instruments Act and the accused persons are residing outside the jurisdiction of the Criminal Court i.e. beyond the jurisdiction of the learned Judicial Magistrate, First Class, Ahmednagar, it is obligatory on the part of learned Magistrate to make inquiry under Section 202 (1) as per amended provisions of Criminal Procedure Code in the year 2005-06.

10. Learned counsel further argued that it is the allegation of the complainant in the complaint itself that accused nos. 2 and 3 on behalf of accused no.1 Company have signed the cheque. Therefore, rest of the accused persons are not responsible for dishonor of the cheque, since they have not signed the cheque. therefore, they cannot be prosecuted.

11. On perusal of the contents of the complaint, it appears that it is the allegation of the complainant that accused nos. 2 and 3 have signed the cheque.

12. Mr. Chapalgaonkar, learned counsel appearing for the petitioners has, therefore, relied upon the observations in the case of **Aparna A.Shah vs Sheth Developers Pvt. Ltd. and Anr.**, reported in **2013 (4) Bom.C.R.879**, particularly para nos. 22 and 23, which read thus :-

" 22) In the light of the above discussion, we hold that under Section 138 of the Act, it is only the drawer of the cheque who can be prosecuted. In the case on hand,

admittedly, the appellant is not a drawer of the cheque and she has not signed the same. A copy of the cheque was brought to our notice, though it contains name of the appellant and her husband, the fact remains that her husband alone put his signature. In addition to the same, a bare reading of the complaint as also the affidavit of examination-in-chief of the complainant and a bare look at the cheque would show that the appellant has not signed the cheque.

23) We also hold that under Section 138 of the N.I. Act, in case of issuance of cheque from joint accounts, a joint account holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account holder. The said principle is an exception to Section 141 of the N.I. Act which would have no application in the case on hand. The proceedings filed under Section 138 cannot be used as an arm twisting tactics to recover the amount allegedly due from the appellant. It cannot be said that the complainant has no remedy against the appellant but certainly not under Section 138. The culpability attached to dishonour of a cheque can, in no case "except in case of Section 141 of the N.I. Act" be extended to those on whose behalf the cheque is issued. This Court reiterates that it is only the drawer of the cheque who can be made an accused in any proceeding under Section 138 of the Act. Even the High Court has specifically recorded the stand of the appellant that she was not the signatory of the cheque but rejected the contention that the amount was not due and payable by her solely on the ground that the trial is in progress. It is to be noted that only after issuance of process, a person can approach the High Court seeking quashing of the same on various grounds available to him. Accordingly, the High Court was clearly wrong in holding that the prayer of the appellant cannot even be considered. Further, the High Court itself has directed the Magistrate to carry out the process of

admission/denial of documents. In such circumstances, it cannot be concluded that the trial is in advanced stage. "

On perusal of the facts and observations of the above cited case, it appears that appellant in that case was not a drawer of the cheque and she had not signed the same. Further, it appears that the cheque was issued by the husband of the appellant but from the joint account.

13. In the present case, the cheque is issued on behalf of the Company by accused no.1 signed by accused nos. 2 and 3 and rest of the accused persons are the Directors having knowledge of the same and that can be gathered from the contents of the complaint itself, wherein it is specifically contended that the cheque dated 1.10.2016 was given to the complainant after accused nos. 2 and 3 signed on behalf of accused no.1 and accused nos. 2 to 8 gave assurance that the cheque will be honoured on the due date and accordingly the complainant had accepted the same. So, accused nos. 2 to 8 are acting on behalf of accused no.1

Company and they are directly connected with the day-to-day affairs of the Company. Therefore, they are liable for the prosecution as per the provisions of Section 141 of the Negotiable Instruments Act. Section 141 of the Negotiable Instruments Act reads thus : -

" 141. Offences by Companies - (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence :

[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of,

or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation.-- For the purposes of this section,

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(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.] "

From the bare reading of aforesaid provisions, it appears that if offence is committed by the Company, then every person who, at the time of offence was incharge and was responsible for the conduct of business of the Company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

14. In the present case, there is specific allegation against accused nos. 2 to 8 about commission of the offence.

In the case cited above, it is observed

that under Section 138 of the Negotiable Instruments Act, in case of issuance of cheque from joint account, a joint account holder cannot be prosecuted unless cheque has been signed by each and every person, who is a joint account holder. It is further material to note that the said principle is an exception to Section 141 of the Negotiable Instruments Act. In the present case, cheque is issued by the Directors of the Company. Therefore, the allegations clearly fall within the definition of Section 141 of the Negotiable Instruments Act.

15. In view of above, when all the Directors are connected with the business of the Company, it will make no difference if the cheque is issued by one or all the Directors, because the cheque was issued for and on behalf of the Company.

16. For the reasons stated above, I am of the opinion that the first point argued by Mr. Chapalgaonker, learned counsel is not acceptable.

17. The next aspect argued by Mr. Chapalgaonker, learned counsel is that the learned Magistrate has issued process without complying with the mandatory provisions of Section 202 of the Criminal Procedure Code. Learned counsel placed reliance upon the observations in the case of **Netcore Solutions Pvt. Ltd. And ors. Vs Pinnacle Teleservices Pvt. Ltd. And ors.**, reported in 2013 (4) Bom.C.R. (C ri.) 286.

18. Before analyzing the contention raised by the learned counsel for the petitioners and referring to the judgment cited, it would be necessary to embark upon the provisions of Sections 200 and 202 of the Criminal Procedure Code.

**" 200. Examination of complainant—**A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate; Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses,—

(a) if a public servant acting or

purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192;

Provided further that if the Magistrate makes over the case to another Magistrate under Section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

**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 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) 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."

On perusal of the aforesaid provisions, it appears that the object of Section 200 of the Criminal Procedure Code is to test whether the complainant makes out a sufficient ground for the purpose of issuing process. Amended Section 202 (1) of the Criminal Procedure Code makes it obligatory upon the learned Magistrate that before summoning the accused residing beyond the jurisdiction of the Court, he shall enquire the case himself or direct the investigation to be made by the police officer or such other person as he thinks fit for finding out whether or not there is sufficient ground to proceed against the accused. Thus, it appears that the object of such inquiry is to ensure that the innocent persons residing beyond the jurisdiction of the Magistrate are not harassed by unscrupulous persons by filing false complaints. Therefore, it casts a duty

upon the Magistrate to arrive at prima facie satisfaction whether or not there is sufficient ground to proceed against the accused residing beyond his jurisdiction.

19. Learned counsel for the respondent has relied upon the observations in the case of **Vijay Dhanuka vs Najima Mamtaj**, reported in **2014 ALL MR (Cri.) 1924 (SC)**. The Apex Court, while considering the scope of Section has held that Section 202 of Criminal Procedure Code, inter alia, contemplates postponement of the issue of the process, in a case where the accused is residing at the place beyond the area in which he exercises his jurisdiction, and thereafter to either enquire into the case by himself or direct an investigation to be made by the police officer or by such other person as he thinks fit. The Apex Court has held that the amendment of Section 202 of the Criminal Procedure Code was necessitated, as false complaints were filed against persons residing at far off places in

order to harass them. Considering the purpose for which the amendment has been brought, the Apex Court held that an inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.

20. Learned counsel for the respondent has brought to my notice the observations in the case of **Bansilal S.Kabra vs Global Trade Finance Ltd.**, reported in **2010 ALL MR (Cri.) 3168**, by this Court (**Coram : V.M.Kanade, J.**) while considering the applicability of the provisions of Section 202 of the Criminal Procedure Code to the complaints filed under Section 138 of the Negotiable Instruments Act, this Court has held that the inquiry, which has to be made in complaint filed under Section 138 of the Negotiable Instruments Act, is very limited to certain documents and averments in the complaint. It is held that the mandate of Section 202 of the Criminal Procedure Code, if made applicable to the

complaints filed under Section 138 of the Negotiable Instruments Act, would defeat the very purpose behind the enactment of Section 138 of the Negotiable Instruments Act. Thus, upon considering and analysing the object and ambit of Section 138 of the Negotiable Instruments Act vis-a-vis the object of Sub-section (1) of Section 202 of the Criminal Procedure Code, the learned Judge of this Court has observed as follows : -

" I am of the view that the said provision may not apply to the provisions of Negotiable Instruments Act and merely because the accused reside 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, in my view, can exercise his discretion and decide whether to issue process, dismiss the complaint after recording the verification of the complainant and his witnesses, if any, or postpone the issuance of process and in a given case hold a further inquiry, depending on facts and circumstances of each case and non-compliance of the said provision would not vitiate the issuance of process if there is material to indicate that there has been an application of mind on the part of the Magistrate after going through the verification and other material brought on record by the complainant".

Considering the pendency of large number of applications under Section 482 of Cr.P.C. for quashing the process for non compliance of provisions of Section 202 of Cr.P.C., and in order to avoid conflicting

judgments the learned Judge of this court held that this important issue needs to be finally resolved by the division bench or the larger bench of this court. "

21. In the case of **Vinod Vs. SBI Global Factors Ltd.**, reported in 2011 (4) Mh.L.J. 282, this Court has taken a similar view and concurred with the judgment in the case of **Bansilal S. Kabra** (supra).

22. Learned counsel for the respondent has pointed out the observations in the case of **Vimal Powerloom vs Ravi Agency and Anr.**, reported in 2015 Bom.C.R. (Cri.) 475, wherein the Co-ordinate Bench of this Court (**Nalawade T.V.,J.**) observed as follows : -

" The various decisions rendered by this Court show that this court has held that the provisions of Section 202 as amended is mandatory in nature. Thus the courts are following the amended provisions in the 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 JMFC. In view of this position of law, this court holds that the order of issue process passed by the JMFC, 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 enquiry under Section 202 of Cr.P.C. is very limited. It is also required to keep in mind the relevant provisions of N.I.Act like Section 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 JMFC. Thus the scope of enquiry, which may be made by the Magistrate is very limited. In such a case to send the matter to police even for limited purpose of investigation is not desirable. "

With the above observations, the process was set aside and the matter was remanded with direction to follow procedure laid down under Section 202 of the Criminal Procedure Code.

23. Looking to the observations in the case of **Bansilal S.Kabra vs Global Trade Finance Ltd.**, reported in 2010 ALL MR (Cri.) 3168 and in the case of **Vimal Powerloom vs Ravi Agency and Anr.**, reported in 2015 Bom.C.R. (Cri.) 475, it appears that the Co-ordinate Bench of this Court has rendered conflicting view on the same question.

24. Learned counsel for both the parties submitted that Reference is pending in this Court and controversy will be finally resolved in the said Reference.

25. In the case of **Manager, National Insurance Company Limited vs Saju P.Paul and another**, reported in (2013) 2 SCC 41, it is observed that the issue pending for consideration by Larger Bench is no bar to follow the judgment under Reference. In view of above, it is important to take into consideration the view which is in conformity with the scheme of the Act.

26. To consider this material aspect, it is necessary to keep in mind the provisions of Sections 143 to 147 of the Negotiable Instruments Act (Amendment and Miscellaneous Provisions) Act, 2012, which came into force with effect from 6.2.2003. By this Act, Sections 138, 141 and 142 of the Act were amended and Sections 143 to 147 of the Act were introduced with an aim to ensure

expeditious disposal of the cases relating to dishonor of cheque, which are found to have clogged the criminal justice system.

27. The provisions of Sections 142 to 147 of the Act lay down special code for trial of offences under Chapter XVII of the Negotiable Instruments Act.

28. While considering the scheme of the amended provisions of the Negotiable Instruments Act, the Apex Court, in the case of **Mandvi Co.op. Bank Ltd. Vs Nimesh B. Thakore**, reported in (2010) 2 SCC (Cri.) 1, held that provisions of Sections 143, 144, 145 and 147 of the Act expressly depart and override the provisions of the Criminal Procedure Code and observed as follows : -

" 20. It may be noted that the provisions of sections 143, 144, 145 and 147 expressly depart from and override the provisions of the Code of Criminal Procedure, the main body of adjective law for criminal trials. The provisions of section 146 similarly depart from the principles of the Indian Evidence Act. Section 143 makes it possible for the complaints under section 138 of the Act to be tried in the summary manner, except,

of course, for the relatively small number of cases where the Magistrate feels that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily. "

29. So looking to the observations of the Apex Court in the case cited supra, it appears that the provisions of Section 143 to 145 and 147 of the Negotiable Instruments Act expressly depart and override the provisions of the Criminal Procedure Code. Therefore, the observations in the case of **Bansilal S. Kabra** (cited supra) need to be followed.

30. Considering the facts and circumstances and the observations in various cases, referred above, I am of the opinion that the learned Magistrate is not under obligation to direct the investigation to be made by the police officer. If he himself is satisfied that there is prima facie case to issue process, then on its satisfaction, the learned Magistrate can issue process directly.

31. In the present case, the complainant has submitted his affidavit in the form of verification of the complaint before the Court and on perusal of the contents of verified affidavit of the complainant and after satisfaction the learned Trial Court has issued process.

32. In view of the above, I do not find any illegality with the order passed by the learned Magistrate, and as such, Criminal Writ Petition deserves to be dismissed.

33. In the result, Criminal Writ Petition is dismissed. No costs.

**(K.L.WADANE, J.)**

dbm