

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.1541 OF 2016

Kunal Rajesh Kothari
Aged – 36 years, Occupation – Business,
R/at.610, Bhoomi Residency,
Mahavir Ngar, Dhanukar Wadi,
Kandivali (West), Mumbai. .. Petitioner

Vs.

1) The State of Maharashtra;
2) Viral Suresh Desai,
R/at. 163/26, Railway Lines,
Solapur, Maharashtra .. Respondents

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Mr.Rishi Bhuta, Advocate for the Petitioner.
Mr.S.R. Shinde, APP for the Respondent – State.
Mr.P.G. Sarda, Advocate for Respondent No.2.

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CORAM : PRAKASH D. NAIK, J.

DATED : JUNE 25, 2018.

JUDGMENT :

Heard both side for final disposal. The petitioner is facing prosecution for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881. The proceedings are pending before the Court of Judicial Magistrate, First Class, Solapur.

2 The complainant's case is that the accused had issued a cheque dated 8th July, 2015, for an amount of Rs.55,00,000/-, and another cheque for an amount of Rs.5,25,000/-. The said cheques were deposited on 29th July, 2015. The cheques were dishonoured. The complainant forwarded notice of demand. However, the amount was not returned, and, hence, the complaint was filed on 9th October, 2015.

3 The Court of Judicial Magistrate, First Class, Solapur, issued process against the accused for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881, by order dated 19th January, 2016.

4 The only ground which is raised challenging the issuing process by the petitioner is that the trial Court had taken cognizance of the complaint without taking recourse to inquiry under Section 202 of the Code of Criminal Procedure. It is contended by the petitioner that he is resident of Mumbai and the complaint was filed in the Court at Solapur. It is submitted that on perusal of Roznama it can be seen that no inquiry as mandated under Section 202 of Cr.P.C. was conducted by the trial Court. It

is submitted that the accused was residing beyond the jurisdiction of the trial Court, and, therefore, in accordance with Section 202 of Cr.P.C., it was mandatory to hold an inquiry contemplated therein before taking cognizance of complaint.

5 Learned counsel for the petitioner in support of his submission relied upon the following decisions:

- (i) Netcore Solutions Pvt. Ltd. & Ors. Vs. M/s.Pinnacle Teleservices Pvt. Ltd. & Ors.¹;**
- (ii) Harish s/o. Ramesh Rao Ukey & Ors. Vs. Sau. Kiranlata w/o.Harish Ukey²;**
- (iii) UNI Multi Trade India Pvt. Ltd. & Ors. Ms.Veera Shinde Dr.Sonal & Anr.³**

6 Per contra, the learned counsel for the respondents submitted that the inquiry contemplated under Section 202 of Cr.P.C. is not mandatory in relation to the proceedings under Section 138 of the Negotiable Instruments Act, 1881. It is submitted that the learned Magistrate has taken into consideration the documents on record and has issued process. It is not necessary to call for any inquiry, as contemplated under Section 202 of Cr.P.C

1 Criminal Writ Petition No.138 of 2011, decided on 21.11.2011.

2 2016 ALL MR (Cri.) 4096

3 CDJ 2014 BHC 1622, Decided on 26.02.2014

7 Reliance is placed on the following decisions of this Court:

(i) Dr.(Mrs.) Rajul Ketan Raj Vs. Reliance Capital Ltd. & Anr.⁴;

(ii) Vijay Tata Ravipati Vs. Mediascope Punlicitas (India) Pvt. Ltd. & Anr.⁵

8 In the case of **Dr.(Mrs.) Rajul Ketan Raj (Supra)**, this Court after taking into consideration several decisions, has taken a view that it is not mandatory to hold the inquiry contemplated under Section 202 of Cr.P.C. The said view was accepted by me in the decision in the case of **Vijay Tata Ravipati (Supra)**, which is relied upon by the learned counsel for the respondents. In the case of **Dr.(Mrs.) Rajul Ketan Raj (Supra)**, this Court has taken note of decision in the case of **Netcore Solutions Pvt. Ltd. & Ors. (Supra)**. In the case of **Vijay Tata Raviptati (Supra)**, it was argued that the applicant accused is residing beyond jurisdiction of the trial Court and hence it was mandatory to conduct enquiry in accordance with amended provisions of Section 202 of Cr.P.C. It was contended that though there is reference of Section 202 of Cr.P.C., no

4 2016 SCC OnLine Bom 1076, decided on 12.02.2016

5 2017 0 Supreme (Mah) 1608, decided on 13.10.2017

enquiry was conducted in proper perspective. The applicant therein had relied on decision of Supreme Court in the case of ***National Bank of Oman Vs. Barakara Abdul Aziz & Anr.***⁶ and ***Netcore Solutions Pvt. Ltd. (Supra)***. In both the decisions, the Court had taken view that such enquiry is mandatory. The decision of Apex Court was relating to the proceedings under penal code and the decision of this Court in ***Netcore Solutions Pvt. Ltd. (Supra)*** relates to proceedings under Negotiable Instruments Act. While deciding the case of ***Vijay Ravipati (Supra)***, it was observed that there is no specific mode of enquiry under Section 202 of Cr.P.C. and apart from that it is not mandatory to hold such enquiry in the complaint under Section 138 of Negotiable Instruments Act. In the said decision, this Court has accepted the view taken in the case of ***Rajul Ketan Raj (Supra)***.

9 The object of Section 200 of Criminal Procedure Code is to test whether the complaint makes out sufficient ground for the purpose of issuing process. The amended Sub-section (1) of Section 202 of Cr.P.C. makes it obligatory upon Magistrate that before summoning the accused residing beyond his jurisdiction

6 (2013) 2 SCC 488

he shall enquire into the case himself or direct investigation to be made by a 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. The object of such inquiry is to ensure that innocent persons residing beyond the jurisdiction of the Magistrate are not harassed by unscrupulous persons by filing false or vexatious complaints. It casts a duty on the Magistrate to arrive at a *prima facie* satisfaction whether or not there is sufficient ground to proceed against the accused residing beyond jurisdiction of the Court. In the case of ***Bansilal S. Kabra Vs. Global Trade Finances Ltd.***⁷, while considering the applicability of the provisions of Section 202 of Cr.P.C 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 Negotiable Instruments Act, is very limited to certain documents and the averments in the complaint. It is held that the mandate of Section 202 of Cr.P.C. if made applicable to the complaints filed under Section 138 of Negotiable Instruments Act, would defeat the very purpose behind the enactment of Section 138 of Negotiable Instruments Act. Thus, upon considering and analysing the object and ambit of Section

7 2010 ALL MR (Cri) 3168

138 of N.I. Act *vis-a-viz* the objection of Sub-section (1) of Section 202 of Cr.P.C., the Court had observed that the provision may not apply to the provisions under Section 138 of Negotiable Instruments Act, and, merely because accused reside outside the jurisdiction of the Court, in each and every case it is not necessary for the Court to postpone the issue of process. The Magistrate can exercise his discretion and decide whether to issue process, dismiss the complaint after recording 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 issuance of process. If there is material to indicate that there is application of mind on the part of the Magistrate after going through the verification and other material brought on record by the complainant. The Court however feel that this issue has to be resolved by Larger Bench.

10 In the case of ***Dr.Rajul (Supra)*** this Court after referring to several decisions including ***Netcore Solutions Pvt. Ltd. (Supra)*** and the decision in ***Bansilal Kabra (Supra)***, and

Vinod Vs. SBI Global Factors Ltd.⁸, holding that compliance with the provisions of Section 138 of Negotiable Instruments Act is only directory and not mandatory is in accord with the Scheme of the Negotiable Instruments Act and the legislative intent that such complaints are disposed of in expeditious manner. In my opinion the view taken in this decision is required to be accepted. I have already adopted the said view in the case of ***Vijay Tata Ravipati (Supra)***. In the present case, the trial Court has issued process on the basis of averment in the complaint, documents therein and the verification statement which do not require interference.

11 In the circumstances, Writ Petition is devoid of merit and the same deserves to be dismissed.

12 Hence, I pass the following order:

:: ORDER ::

Writ Petition is dismissed.

(PRAKASH D. NAIK, J.)

⁸ 2011 (4) MH.L.J. 282