

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1741 OF 2019

- 1) Shri Makai Sahakari Sakhar Karkhana Ltd.,
at Bhilarwadi, Post. Jintee Tal. Karmala
Dist. Solapur – Through Its Chairman and
Managing Director.
- 2) Digvijay Digambarrao Bagal Patil,
Age 29 years, Occupation Chairman of
Shri Makal Sahakari Sakhar Karkhana
Ltd. At bhilarwadi, R/o Bhilarwadi
Post Jintee Tal. Karmala Dist.Solapur.
- 3) Ashok Shrirang Nalawade,
Age 65 years, Occupation Managing
Director of Shri Makal Sahakari Sakhar
Karkhana Ltd. At bhilarwadi, R/o Bhilarwadi
Post Jintee Tal. Karmala Dist.Solapur.

.....Petitioners.

VERSUS

Gangamai Industries & Construction Ltd.,
Hari Nagar, Najik Babbulgaon,
Post. Rakshi Tql. Shevgaon
Dist. Ahmednagar – Having Registered
Office At 2nd Floor, Tapadiya Terraces,
Adalat Road, Aurangabad Through Its
Authorized officer, Shri Vishnu
Shripatrao Khedekar, Age 53 years,
Occupation Service, R/o As above.

.....Respondent.

...
Advocate for Petitioners : Mr. Gaware Niteen V.
Senior Counsel for Respondent : Mr. V. D. Hon i/b Mr. S. B. Kakde.
...

CORAM : SMT.VIBHA KANKANWADI. J.
DATE : 18-12-2019.

JUDGMENT :

1. Rule. Rule made returnable forthwith. By consent, heard finally.

2. Present writ petition has been filed by original accused persons challenging the order dated 17-05-2019 passed by learned Judicial Magistrate, First Class, Aurangabad, in Summary Criminal Case No.5600 of 2019, whereby process came to be issued against them on the basis of complaint filed by the present respondent.

3. Present respondent original complainant has filed the said complaint alleging that the present petitioners i.e. original accused have committed offence punishable under Section 138 of the Negotiable Instruments Act. After the complaint was filed which was in respect of six disputed cheques, total amount to Rs.1,85,60,000/-, it appears that the affidavit of the complainant was perused. Taking in to consideration the contents of the complaint, said affidavit and all the documents produced by the complainant as well as after hearing the learned advocate representing the complainant, a detailed order of issuing process against the accused No.1 to 3 under Section 204 of Code of Criminal Procedure for the offence punishable under Section 138 of the Negotiable Instruments Act has been passed.

4. Heard learned advocate Mr. N. V. Gaware for the petitioners and learned Senior Counsel Mr. V. D. Hon instructed by Mr. S. B. Kakde for the respondent.

5. It has been vehemently submitted on behalf of the petitioners that, admittedly all the accused persons i.e. present petitioners are not residence of the territorial jurisdiction of learned Magistrate at Aurangabad. Therefore, in view of the provisions of Section 202 of Code of Criminal procedure, an inquiry ought to have been held by the learned Magistrate which is mandatory in nature. He relied on the decision of this Court in *Parth Bhadresh Mehta and Others v. State of Maharashtra and Another*, reported in 2019 (2) Bom.C.R. (Cri.) 207, wherein it has been held that,

"inquiry is not only for purpose of ascertaining as to whether magistrate has local/ territorial jurisdiction but also to ascertain as to whether there is sufficient material to make out prima facie case for issue of process. Therefore, provision of section 202 is mandatory in nature and that needs to be followed even when case is filed under section 138 of Negotiable Instruments Act."

Based upon this decision it is submitted that, since the mandatory process has not been followed, the said order of issuing process needs to be quashed and set aside.

6. Learned Senior Counsel appearing for the respondent submitted that, since this Court has taken the view that provision of Section 202 of Code of Criminal Procedure is mandatory in nature even in cases under Section 138 of the Negotiable Instruments Act and at this stage the reference on the point is pending before the Larger Bench of this Court and also the matter is pending before the

Larger Bench of the Apex Court as has been done in the above said decision in *Parth Bhadresh Mehta (Supra)*, directions can be issued to the learned Judicial Magistrate to follow the procedure under Section 202 of Code of Criminal Procedure.

7. In fact, the learned Senior Counsel had submitted that, since the offence is based on the documents and necessary material is before the Court in the form of affidavit supporting the complaint, and the other documents, the purpose for which an inquiry under Section 202 of Code of Criminal procedure is required to be made gets fulfilled.

8. Before going into the discussion it is necessary to consider the provision of Section 202 of Code of Criminal Procedure ;

"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."

9. In the decision of *Parth Bhadresh Mehta (Supra)* the purpose behind the amendment in Section 202 of Code of Criminal procedure has been noted and various decisions have been considered on the point. Some of the decisions were in respect of various High Courts and it has been observed that most of the Hon'ble Judges of this Court have held that the amended provision of Section 202 of Code of Criminal procedure as mandatory in nature. Note of the decision by the Apex Court in *Vijay Dhanuka Etc. v. Najima Mamtaj Etc.,*

reported in *2014 AIR (SC) (Supp) 756*, was also considered which was on the point of intention behind the amended Section 202 of Code of Criminal Procedure thereby stating that it is mandatory in nature. When in this case admittedly the accused persons are residence of the place which is beyond the territorial / local jurisdiction of the learned Magistrate, and in view of the fact that the decision at the principal seat in *Bansilal S. Kabra v. Global Trade Finance Ltd. & Anr., Criminal Application No.1344 of 2010, decided on 29th July 2010*, before the Full Bench is still pending and the order passed in the said petition dated 29th July 2010 is pending before the Hon'ble Supreme Court. The similar view that has been taken in *Parth Bhadresh Mehta (Supra)* is required to be taken here. It has been specifically observed in *Parth Bhadresh Mehta's Case (Supra)* that, in view of the said situation two options were open in such cases viz. (1) to stay the proceeding and wait for the decision of the Apex Court in view of the cases decided by the Apex Court; or, (2) direct the Magistrate to follow the mandatory provision of Section 202 of Code of Criminal Procedure. This Court has opted for the second option. It would be in the interest of both the parties that the Magistrate is directed to take the necessary steps for following the procedure under Section 202 of Code of Criminal Procedure. Hence, following order.

ORDER

- (1) Writ petition is partly allowed.
- (2) Order of issuing process against the present petitioners i.e. Original accused No.1 to 3 passed in Summary Criminal Case No.5600 of 2019 by learned

Judicial Magistrate, First Court, Court No.11, Aurangabad, dated 17-05-2019, is hereby set aside.

(3) The learned Magistrate to take up the procedure as contemplated under Section 202 of the Code of Criminal Procedure from the date of the decision, as amended in 2005 and then to proceed with the complaint as per law.

(4) Rule made absolute in above said terms.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.