

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-16026-2015 (O&M)
Date of Decision :24.10.2019

Ambico Integrated Marketing and others

....Petitioners

Versus

UT of Chandigarh and another

...Respondents

CORAM : HON'BLE MR.JUSTICE ANIL KSHETARPAL

Present : Ms. Baljit Mann, Advocate for the petitioner

Mr. J.S.Toor, APP, UT, Chandigarh

ANIL KSHETARPAL, J.

Petition under Section 482 Cr.P.C (hereinafter referred to as 'Code') has been filed challenging the order issuing process against the petitioner and another (accused) in a criminal complaint filed under Section 138 of the Negotiable Instruments Act, 1881. Notice was issued on 15.5.2015 by passing following order:-

“It is the contention raised by learned counsel that the impugned complaint dated 23.11.2013 at Annexure P-7, under Section 138 of the Negotiable Instruments Act is palpably false and totally unfounded as it proceeds on a MOU having been executed between the accused persons i.e. the present petitioners herein and the complainant on 30.08.2013 and in furtherance

thereof, the bankers in question i.e. ICICI Bank having issued a principal sanction letter in favour of the accused.

It is contended that in the first instance, the MOU i.e. Dated 30.08.2013 and placed on record at Annexure P-8 is between the complainant and R.P. Singh, representing Trimurti Exim Private Limited.

The second contention raised is that the falsity would be apparent as the principal sanction letter issued by ICICI Bank carries a date even prior to the issuance of MOU.

To substantiate such assertion, a weeks' time is sought to place on record such principal sanction letter issued by the bankers and which has been referred to in the MOU.

List on 27.05.2015.”

Thereafter, the petition was admitted by noticing the same contentions vide order dated 26.10.2018 which is extracted as under:-

“Learned counsel for the petitioners submits that the cheque in dispute was never issued by them as no occasion had arisen for issuance thereof. The petitioners could only have issued a cheque in favour of Mr. R.P. Singh after the performance bank guarantee was sanctioned by the ICICI Bank. The complainant was nowhere in the picture, so far as the petitioners are concerned. The complainant in connivance with Mr. R.P. Singh got opened a bank account in the name of

petitioner No.1 at Chandigarh and obtained a cheque book for the said account. A leaf from this cheque book was misused by the complainant resulting in the complaint under Section 138 of the Negotiable Instruments Act, 1881. Thus, it is apparent that the filing of the complaint is abuse of the process of criminal law. Moreover, the petitioners are residing outside the territorial jurisdiction of the trial Court and the requirements of Section 202 Cr.P.C., has not been complied with before summoning the petitioners.

Respondent No.2 is not represented despite service.

Admitted.

Interim order to continue.”

Question which this Court is called upon to answer is whether for the purpose of inquiry as envisaged under Section 202 of the Code, is it necessary to examine all the witnesses cited in the complaint before the order issuing process is passed or not?

At this stage, it is necessary to note that Section 202 of the Code underwent an amendment by the Legislature by Act No. 25 of 2005 applicable with effect from 23.6.2006. The pre-amendment Section 202 read as under:-

202 Postponement of issue of process (1)

Any Magistrate, on receipt of a complaint of an offence of which he is authorized 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) is made by a person not being a police officer, he shall have for that an investigation all the powers conferred by this Code on an officer in charge of police station except the power to arrest without warrant.”

Post 2006 amendment Section 202 reads as under:-

202 Postponement of issue of process (1)

Any Magistrate, on receipt of a complaint of an offence of which he is authorized 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.

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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 police station except the power to arrest without warrant.”

On plain reading of the amended Section 202 post 2006 amendment it is apparent that it has been made incumbent on the Magistrate, who either inquire into the case himself or direct an investigation to be made by a police officer or by some other persons as he thinks fit, if the accused is residing at a place beyond the area in which he exercises his jurisdiction. The purpose for holding such an inquiry is to arrive at a conclusion whether or not there is sufficient ground for proceeding. Sub Section (2) of Section 202 enables the Court to take evidence of the witness on oath, if he thinks fit.

Section 202, pre and post 2006 amendment has been interpreted by the Hon'ble Supreme Court in various judgments. However, post 2006 amendment, first judgment dealing with the amended provision is in the case of **Shivjee Singh Vs. Nagendra Tiwary and others** (2010) 7 SCC 578. Hon'ble Supreme Court after examination of scheme of the Code with reference to entertaining criminal complaint while examining provisions of Sections 200, 202, 203, 204, 207, 208 and 209 held that the examination of all the witnesses cited in the complaint is not necessary before the

Magistrate decides to issue process. In para 1 of the judgment passed, the

Hon'ble Supreme Court framed the question which is required to be answered. Thereafter, in para 7 the Court considered the scope of interpretation with reference to the fact that Code of Criminal Procedure is a procedural Code. Ultimately, in para 22 and 32 the Hon'ble Supreme Court answered the question. The relevant paras are extracted as under:-

“22. The use of the word “shall” in the proviso to Section 202 (2) is prima facie indicative of mandatory character of the provision contained therein, but a close and critical analysis thereof along with other provisions contained in Chapter XV and Sections 226 and 227 and Section 465 would clearly show that non-examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the Magistrate concerned of the jurisdiction to pass an order for taking cognizance and issue of process provided he is satisfied that prima facie case is made out for doing so. Here it is significant to note that the word “all” appearing in the proviso to Section 202 (2) is qualified by the word “his”. This implies that the complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process.

32. As a sequel to the above discussions, we hold that examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the direction given by the Magistrate in terms of the proviso to Section 202 (2) is not a condition precedent for taking cognizance and issue of process against the persons named as accused in the complaint and the High Court committed serious error in directing the Chief Judicial Magistrate to conduct further inquiry and pass fresh order in the light of the proviso to Section 202 (2).”

It is significant to note here that in the aforesaid case, the Hon'ble Supreme Court was dealing with a situation where Magistrate had issued process as envisaged under Section 204 of the Code, after examination of two out of four witnesses cited in the petition-cum-complaint. However, the High Court set aside the order and held that the Chief Judicial Magistrate could not have taken cognizance without requiring the complainant to examine all the witnesses. The Hon'ble Supreme Court on interpretation found that order passed by the High Court was erroneous and therefore, set aside the same.

Next judgment is in the case of **National Bank of Oman vs. Barakara Abdul Aziz and another** (2013) 2 SCC 488 while dismissing the appeal against judgment passed by the High Court wherein Magistrate was directed to hold inquiry under Section 202, the Hon'ble Supreme Court held that there is no error in the order passed by the High Court, particularly, in view of the fact that Magistrate had issued process without holding any

inquiry as mandatorily required under Section 202 of the Code. Next judgment on the issue is in the case titled as **Udai Shankar Awasthi vs. State of Uttar Pradesh and another'** reported as (2013) 2 SCC 435. In para 40, the Hon'ble Supreme Court referred to the judgment passed in the case of Shivjee Singh (supra) and followed the same. Para 40 of the judgment is extracted as under:-

“40. The Magistrate had issued summons without meeting the mandatory requirement of Section 202 Cr.P.C , though the appellants were outside his territorial jurisdiction. The provisions of Section 202 Cr.P.C were amended vide the Amendment Act, 2005, making it mandatory to postpone the issue of process where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned. The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other person as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases. (See also Shivjee Singh Vs. Nagendra Tiwary, SCC p.584, para 11 and National Bank of Oman v. Barakara Abdul Aziz)

Next judgment on the point is **Vijay Dhanuka and others vs.**

Supreme Court after taking note for the amendment in para 12 held as under:-

“14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word “inquiry” has been defined under Section 2(g) of the Code, the same reads as follows:

2(g) 'inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court,”

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code.”

Thereafter, the Hon'ble Supreme Court examined this issue in

the Magistrate has held the inquiry before issuing process.

Learned counsel for the petitioners has drawn attention of the Court to various judgments passed by the Hon'ble Single Benches of this Court interpreting Section 202 of the Code. In view of various judgment passed by the Hon'ble Supreme Court, this Court does not find it appropriate to burden this judgment by discussing the judgment passed by learned Single Judge. Hon'ble Supreme Court in the case of **Birla Corporation Limited vs. Adventz Investments and Holdings Limited and Others** AIR 2019 SC 2390 noted that after the Magistrate had fixed the case for inquiry under Section 202 of the Code, the complainant examined P.B. Dinesh, an employee of the complainant-Company only and thereafter the Court issued process. In para 61 it was held as under:-

“61. The object of investigation under Section 202 Cr.P.C is “for the purpose of deciding whether or not there is sufficient ground for proceeding”.

The enquiry under Section 202 Cr.P.C is to ascertain the fact whether the complaint has any valid foundation calling for issuance of process to the person complained against or whether it is a baseless one on which no action need be taken. The law imposes a serious responsibility on the Magistrate to decide if there is sufficient ground for proceeding against the accused. The issuance of process should not be mechanical nor should be made as an instrument of harassment to the accused. As discussed earlier, issuance of process to the accused calling upon them to appear in the criminal case is a serious matter and

lack of material particulars and non-application of mind as to the materials cannot be brushed aside on the ground that it is only a procedural irregularity. In the present case, the satisfaction of the Magistrate in ordering issuance of process to the respondents is not well founded and the order summoning the accused cannot be sustained. The impugned order of the High Court holding that there was compliance of the procedure under Section 202 Cr.P.C cannot be sustained and is liable to be set aside.”

On examination of the aforesaid judgments passed by the Hon'ble Supreme Court, only inescapable conclusion is that it is not necessary for the complainant to examine all the witnesses cited in the complaint before an order issuing process is envisaged under Section 204 of the Code is passed. The Court as noticed above has been given discretion to issue the process, on being satisfied that there is sufficient ground for proceeding in the criminal complaint. The purpose for amendment as noticed by the the Hon'ble Supreme Court is to avoid un-necessary harassment to the accused residing outside the territorial jurisdiction of the Court in the false criminal complaints filed. However, Section 202 of the Code does not require the Magistrate to direct recording of deposition of all the witnesses cited in the complaint. The Magistrate as per the scheme of Section 202 is required to be more cautious before issuing process in a criminal complaint. Additional duty has been cast upon the Magistrate to examine the evidence led if the Magistrate decides to inquire into the case himself. Such inquiry cannot be equated with proving the case beyond

shadow of reasonable doubt.

This aspect can be further examined in the aspect of the criminal complaint filed under Section 138 of Negotiable Instruments Act. Section 118 and 139 of the Negotiable Instruments Act provide for a statutory presumption in favour of holder of a cheque. In such circumstances it is apparent that the statutory presumption which is in favour of holder of cheque is required to be rebutted by the accused. Thus a reverse onus has been put by the statute on the accused. In such situation now let us examine whether evidence of all the witnesses sited in the complaint are required to be examined before the Court proceeds to issue process. The answer to the aforesaid question has to be in negative. The complainant is not required to prove its case beyond shadow of reasonable doubt at the stage of issuing process.

Argument of the learned counsel for the petitioner is that examination of all the witnesses is necessary as held by the Hon'ble Supreme Court in the case of Birla Corporation Limited (supra). This Court has carefully read the aforesaid judgment relied upon. The Hon'ble Supreme Court in the facts of the case held that deposition of an employee of the complainant-Company is not sufficient. In the facts of the case, the Hon'ble Supreme Court noted that there were series of litigations between the parties including five civil suits, a Company petition. In those facts the Hon'ble Supreme Court held that satisfaction of the Magistrate while passing an order of issue of process to the respondents is not well founded and therefore, the order of summoning the accused cannot be sustained. This Court does not find itself in a position to accept the contention of the learned counsel for the petitioner that the Hon'ble Supreme Court in the case of Birla

Corporation Ltd. (supra) has held that examination of all the witnesses is necessary.

This aspect can further be examined from another angle. In the present case, complainant has appeared in evidence. His evidence has been recorded. Complainant is nonetheless a witness, besides being complainant himself. There is no requirement that witness to be examined under Section 202 of the Code has to be apart from the complainant. The conclusion of the Court is re-enforced by the fact that there is a statutory presumption in favour of holder of cheque noticed above.

Now the stage is set for examining the case on merits. As noticed above there are two contentions of the learned counsel for the petitioners; first is with regard to date of execution of the memorandum of understanding and second is with reference to sanction letter issued by ICICI Bank. This Court after examining all the facts which have come on record does not find that without entering into questions which need to be adjudicated after appreciation of evidence. The adjudication of the contentions as noticed in the order dated 15.5.2015 and thereafter in the order dated 26.10.2018, require appreciation of evidence to be led by the parties which is yet to be led by the parties. This Court does not find that the criminal complaint, at the initial stage, can be quashed in exercise of its powers under Section 482 Cr.P.C in the facts and circumstances of the present case. The contentions as advanced by the learned counsel for the petitioners and duly noted in the orders extracted above are required to be established after leading evidence and thereafter appreciated on the basis of evidence available on record. Hence, this Court is deliberately not venturing

the parties. Hence, without further deliberating upon it is considered appropriate to direct the petitioners to defend criminal complaint before the Magistrate where it is pending with liberty to take all defences as are permissible in law. Hence, present petition is disposed of.

(ANIL KSHETARPAL)
JUDGE

24.10.2019
rekha

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No