

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.473 OF 2021

Sayed Mohammed Omair s/o Sayed Ibrahim .. Petitioner

Versus

1. The State of Maharashtra
2. Riyazuddin s/o Faizuddin Kazi .. Respondents

...

WITH

CRIMINAL WRIT PETITION NO.481 OF 2021

Sayed Ikram s/o Sayed Ibrahim .. Petitioner

Versus

1. The State of Maharashtra
2. Riyazuddin s/o Faizuddin Kazi .. Respondents

...

WITH

CRIMINAL WRIT PETITION NO.483 OF 2021

Sayed Ibrahim s/o Sayed Lateef .. Petitioner

Versus

1. The State of Maharashtra
2. Riyazuddin s/o Faizuddin Kazi .. Respondents

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Mr. A. N. Nagargoje and Mr. D. M. Mane, Advocate for petitioners in all the cases.

Mr. R. B. Bagul, APP for respondent No.1 – State in all the cases.

Mr. K. F. Shingare, Advocate for respondent No.2 in all the cases.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 07.06.2022

ORDER :-

. The writ petitioners are the original accused praying for writ of certiorari, order or direction for calling the record and proceedings of

the respective cases and after examining the legality, validity and propriety of those proceedings, have prayed for quashing and setting aside the proceedings. The petitioner in Criminal Writ Petition No.473 of 2021 is facing trial in S.C.C. No.223 of 2019, the petitioner in Writ Petition No.481 of 2021 is facing trial in S.C.C. No.222 of 2019 and the petitioner in Writ Petition No.483 of 2021 is facing trial in S.C.C. No.221 of 2019 before learned Judicial Magistrate First Class, Washi, Tq. Washi, Dist. Osmanabad filed by respondent No.2 in each case against them for the offence punishable under Section 138 of the Negotiable Instruments Act.

2. Heard learned Advocate Mr. A. N. Nagargoje for the petitioners in all the cases, learned APP Mr. R. B. Bagul for respondent No.1 – State in all the cases and learned Advocate Mr. K. F. Shingare for respondent No.2 in all the cases.

3. It has been vehemently submitted on behalf of the petitioners that the respondent No.2, in his complaint, contended that the petitioners had induced him for purchasing flat at Hyderabad. Petitioners being the builder, brother of the builder and father of the builder had entered into an agreement to sell. It was decided that the consideration would be Rs.31,00,000/- and out of that he had paid Rs.22,50,000/- by 22.04.2017, then he says that instead of selling the said flat to him, it

was sold to some third person on 29.06.2018. Legal notice was issued by him and thereafter, an agreement came to be arrived at. It is contended by the petitioners that certain amounts were paid and out of the amount that was paid by respondent No.2, only balance of Rs.8,50,000/- was remaining. According to the petitioners, they have made certain payments and in order to prove the same, they have produced on record the documents. Cheques were given as security and it was then agreed by the respondent No.2 that after he receives the amount in cash, he will not deposit the same and also withdraw the cases which he had filed. That compromise has been produced before this Court. Even in complaint, the complainant admits that there was an agreement. If he himself had come with that case, then he will not dispute the documents, which have been produced on record. He had no authority to deposit those cheques for encashment. Still, he deposited and the cheque amount in S.C.C. No.223 of 2021 is Rs.31,00,000/-, in S.C.C. No.222 of 2021 it was Rs.10,00,000/- and in S.C.C. No.221 of 2019 it was Rs.10,00,000/-. This is, in fact, more than what he is said to have paid towards the agreement to sell and, therefore, the proceedings itself need to be quashed.

4. The learned Advocate for the petitioners further submitted that though it is not pleaded specifically, yet when the legality and validity of

the proceeding includes the order of issuance of process against the petitioners, then it can be still argued by him that the order of issuance of process passed by the learned Judicial Magistrate First Class, Washi on 20.11.2019 suffers from legality in view of the fact that the accused in respective cases are resident of Hyderabad, which is beyond the jurisdiction of the learned Judicial Magistrate First Class, Washi. Therefore, there is no compliance of Section 202 of the Code of Criminal Procedure by the concerned Court. A routine order cannot be passed when a specific provision is made for holding an inquiry in respect of the accused persons, who are residing beyond the jurisdiction of a Magistrate. Mere perusal of the contents of the complaint and documents under those circumstances cannot amount to the necessary compliance. He relied on the decision in *Suo Motu Writ Petition (Crl.) No.2 of 2020, [AIR 2021 SC 1957]*, wherein it has been held that :-

10. Section 202 of the Code confers jurisdiction on the Magistrate to conduct an inquiry for the purpose of deciding whether sufficient grounds justifying the issue of process are made out. The amendment to Section 202 of the Code with effect from 23.06.2006, vide Act 25 of 2005, made it mandatory for the Magistrate to conduct an inquiry before issue of process, in a case where the accused resides beyond the area of jurisdiction of the court. (See: Vijay Dhanuka & Ors. v. Najima Mamtaj & Ors., [(2014) 14 SCC 638], Abhijit Pawar v. Hemant Madhukar Nimbalkar and Anr., [(2017) 3 SCC 528] and

Birla Corporation Limited v. Adventz Investments and Holdings Limited & Ors.[(2019) 16 SCC 610]). There has been a divergence of opinion amongst the High Courts relating to the applicability of Section 202 in respect of complaints filed under Section 138 of the Act. Certain cases under Section 138 have been decided by the High Courts upholding the view that it is mandatory for the Magistrate to conduct an inquiry, as provided in Section 202 of the Code, before issuance of process in complaints filed under Section 138. Contrary views have been expressed in some other cases. It has been held that merely because the accused is residing outside the jurisdiction of the court, it is not necessary for the Magistrate to postpone the issuance of process in each and every case. Further, it has also been held that not conducting inquiry under Section 202 of the Code would not vitiate the issuance of process, if requisite satisfaction can be obtained from materials available on record.

11. The learned Amici Curiae referred to a judgment of this Court in *K.S. Joseph v. Philips Carbon Black Ltd & Anr.* [(2016) 11 SCC 105] where there was a discussion about the requirement of inquiry under Section 202 of the Code in relation to complaints filed under Section 138 but the question of law was left open. In view of the judgments of this Court in *Vijay Dhanuka* (supra), *Abhijit Pawar* (supra) and *Birla Corporation* (supra), the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot be dispensed with. The learned Amici Curiae recommended that the Magistrate should come to a

conclusion after holding an inquiry that there are sufficient grounds to proceed against the accused. We are in agreement with the learned Amici.

5. He also relied on the decision of the Division Bench of this Court in ***Barakara Abdul Aziz Vs. National Bank of Oman and Anr.***, [2012 ALL MR (Cri) 3825] and submitted that in 2012 itself, this Court had cleared the position of law that Section 202 casts an obligation on the Magistrate to postpone the issuance of process against the accused and either enquire 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 grounds for proceeding in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction. Therefore, even if the decision in *Suo Motu Writ Petition* has come recently i.e. after the order of issuance of process was passed by the learned Magistrate, yet the learned Magistrate has not considered the decision in 2012 i.e. ***Barakara Abdul Aziz (Supra)*** and, therefore, the said order suffers from legality and needs to be quashed.

6. Learned Advocate appearing for respondent No.2 vehemently submitted that as regards the points on the merits of the cases are concerned, they cannot be gone into at this stage. The complainant should have an opportunity to explain all the circumstances and the

documents which he has produced along with the complaint. The original documents have been produced by the complainant before the learned Magistrate and after perusal of those documents, the Magistrate was satisfied that the ingredients of the offence under Section 138 of the Negotiable Instruments Act have been made out. Therefore, quashing of entire proceedings is out of question. Further, as regards the order dated 20.11.2019 is concerned, it has not been specifically challenged in the writ petitions and it is not pleaded that in view of alleged non compliance of Section 202 of the Code of Criminal Procedure, the said order is not sustainable and, therefore, that prayer also cannot be considered at all. Alternatively, it can also be said that in Suo Motu Writ Petition, the Hon'ble Supreme Court gave conclusions in paragraph No.24 and the relevant conclusions for us are :-

“1)

2) Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the Court.

3) For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for

examination of witnesses.

- 4)
- 5)
- 6)
- 7)
- 8)”

7. When the Hon’ble Supreme Court says that the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses, then it can be certainly said that the order of issuance of process complied with these requirements. It has been specifically stated by the Magistrate that he has perused the complaint, documents before issuing process and, therefore, the writ petitions deserve to be dismissed.

8. At the outset, it can be said that when there are disputed questions of facts, then this Court in its writ jurisdiction cannot take up those facts into consideration. Though apparently it may be a fact that there is an agreement to sell and there was some agreement/ compromise, but every admission or contents of document can be explained, then it will have to be left to be decided by the concerned Court after the evidence is adduced in the matter. It can be seen from the documents which are on record that the present respondent No.2 has filed suit for specific performance of the agreement to sell with

further prayers of declaration and then he has also filed the present complaint under Section 138 of the Negotiable Instruments Act. It would then be the matter to be decided by the concerned Court as to whether those cheques were issued towards the discharge of legally enforceable debt or liability. However, at the stage of issuing process under Section 204 of the Code of Criminal Procedure what is required to be seen is the *prima facie* case, however, prior to that there is a hurdle or there is mandatory requirement under Section 202 of the Code of Criminal Procedure, when the accused is residing beyond the territorial jurisdiction of the concerned Magistrate. In ***Barakara Abdul Aziz (Supra)***, which was decided on 03.10.2012 itself by the Division Bench of this Court, the position of law was clarified and it was stated that it is the obligation for the Magistrate to make an inquiry. Between 2012 to 2021 there are further catena of judgments of this Court in which it was clarified that the said compliance of holding an inquiry under Section 202 of the Code of Criminal Procedure, when the accused is residing beyond the territorial jurisdiction of the Magistrate, is mandatory. Therefore, those catena of judgments ought to have been followed by the learned Magistrate while passing the said order dated 20.11.2019.

9. This Court in ***Shobhabai Gangadhar Jakare and anr. Vs. State of Maharashtra and anr., [2016 (3) Bom.C.R.(Cri.) 26***, held that “when the

accused was residing beyond the area on which concerned Magistrate exercises jurisdiction and the Magistrate issued process against the accused without conducting any inquiry or ordering an investigation, then such order is vitiated and, therefore, matter remitted back to the trial Court.” Similar view has been taken in *Hukumchand s/o Rupchand Baretiye and Ors. Vs. The State of Maharashtra and Ors.*, [2018 ALL MR (Cri)108], *Yasmin Akeel Pinjari Vs. Mohd. Khabulal Pinjari*, [2018 ALL MR (Cri) 1156] and *Asma w/o Moinoddin @ Shaker Quazi and Ors. Vs. The State of Maharashtra and Anr.*, [2018 ALL MR (Cri) 3666]. In all the abovesaid cases, reliance has been placed on the decision in *Abhijit Pawar Vs. Hemant Madhukar Nimbalkar*, [2015 SCC Online SC 1533 : 2017 ALL SCR (Cri) 236]. No doubt, all these offences are under Indian Penal Code but the basic procedure that is required to be considered under Section 202 is the same. Further, directly in *Parth Bhadresh Mehta and others Vs. State of Maharashtra and another*, [2019 (5) Mh.L.J.], there was challenge to the order of issuing process under Section 138 of the Negotiable Instruments Act on the ground of non compliance of provision regarding holding inquiry by Court under Section 202 of the Code of Criminal Procedure. This Court again reiterated that the provision is mandatory in nature and needs to be followed in matter under Section 138 of the Negotiable Instruments Act.

It appears that the learned Magistrate has not considered the ratio laid down in the aforesaid decisions.

10. Learned Advocate for the respondent No.2 wants to seek the advantage of the discretion that has been given in Suo Motu Writ Petition by the Hon'ble Apex Court to the Magistrate in suitable cases that he can restrict the inquiry to examination of documents without insisting for examination of witnesses. This discretion or this interpretation was not available to the learned Magistrate when he passed the order. But without going into the technicalities it can be observed that whether from his order he has used that discretion and restricted himself for a specified reason for the examination of documents only and he had not insisted on the examination of witnesses, cannot be spelt out from his order. The complainant had produced his own affidavit in support of the complaint and not of any other witnesses. No doubt, offence under Section 138 of the Negotiable Instruments Act mainly depends upon the documents, yet documents require proof and for that purpose examination of witnesses is the only mode of proof. Even if that discretion that has been given under paragraph 24(3) of the decision of the Hon'ble Apex Court in Suo Motu Writ Petition is to be utilized by the learned Magistrate, then they should assign reason for the same as to why they are restricting themselves to

the examination of documents. When all these things are missing in the order passed by the learned Magistrate, which are part of the challenge in these writ petitions, then such illegal order cannot be allowed to be sustained. It may not have been specifically raised in the writ petitions, but when the legality of the entire proceedings has been challenged, then an order passed under that proceedings can also be challenged that too on a law point and, therefore, there is no hurdle in getting the order corrected and removing the illegality that has been committed by the learned Magistrate and, therefore, writ petitions deserve to be partly allowed with necessary directions. Hence, the following order :-

ORDER

- I) The writ petitions are partly allowed.
- II) The orders of issuing process passed in S.C.C. No.223 of 2019, S.C.C. No.222 of 2019 and S.C.C. No.221 of 2019 dated 20.11.2019 by learned Judicial Magistrate First Class, Washi, Dist. Osmanabad for the offence punishable under Section 138 of the Negotiable Instruments Act against respective petitioners, are hereby set aside.
- III) The matters are remitted back to the concerned Magistrate for its compliance under Section 202 of the Code of Criminal Procedure in view of the fact that the accused are residing beyond the jurisdiction of the Magistrate.

[SMT. VIBHA KANKANWADI, J.]