

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

911 CRIMINAL APPLICATION NO.1655 OF 2021

DATTAPRASAD SANDUJI AMBILWADE
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER
...

Advocate for Applicants : Mr Abhishek Kulkarni
APP for Respondent No. 1/State : Mr R. D. Sanap
Advocate for Respondent No. 2 : Mr Pramod D. Patil

CORAM : SHRIKANT D. KULKARNI, J.

DATE : 6th SEPTEMBER, 2022

PER COURT :

1. Heard finally with consent of both the sides.
2. Respondent No. 2 herein has filed a complaint against the applicant in the Court of Judicial Magistrate First Class, Chalisgaon under section 138 of the Negotiable Instruments Act, 1881.
3. Respondent No. 2 is stated to be permanent resident of Chalisgaon and present applicant is stated to be permanent resident of Ulkanagari, Garkheda Parisar, Garkheda, Aurangabad. The complaint was placed before the learned Magistrate on 03.01.2019 when the following order was passed :-

Keep for verification.

Sd/-
J.M.F.C.

4. On 08.01.2020, the following order was passed below Exh.01 in SCC No. 956/2019 :-

Perused the complaint, Verification statement filed in the form of affidavit and documents accompanied with the complaint. Prima-facie offence punishable under section 138 of Negotiable Instruments Act is made out against the accused. Hence, issue process against the accused for the offence punishable under section 138 of Negotiable Instruments Act on P.F. Returnable on **09/03/2020.**

Sd/-
Judicial Magistrate F.C.
(Court No.2), Chalisgaon

5. The order of issue process passed by the learned Magistrate, Chalisgaon is challenged before this Court mainly on the ground that though the applicant/original accused is stated to be permanent resident of Aurangabad, which is beyond the territorial jurisdiction of JMFC, Chalisgaon, enquiry contemplated under section 202 of Cr.PC was not conducted before passing the order of issue process.

6. Heard Mr Abhishek Kulkarni, learned counsel for the applicant, Mr R.D. Sanap, learned APP for the respondent No.1/State and Mr Pramod Patil, learned counsel for respondent No.2.

7. Mr Abhishek Kulkarni, learned counsel for the applicant vehemently submitted that the impugned order of issue process passed by the learned Magistrate dated 08.01.2020 is bad in law and in contravention of the Constitution Bench decision of the Hon'ble Supreme Court in *Suo Motu Writ Petition (Crl.) No. 2/2020*. He invited my attention to para No.24 of the Constitution Bench decision of the Hon'ble Supreme

Court and pointed out that enquiry under section 202 of Cr.PC is mandatory when the accused resides beyond the territorial jurisdiction of the Court. He also invited my attention to the decision of this Court in ***Criminal Writ Petition No. 716/2019 (Shivshankar Shrikrushna Dhole Vs. State of Maharashtra and Anr.) dated 10.08.2021 (Nagpur Bench)*** and submitted that the impugned order is bad in law and liable to be quashed and set aside.

8. Mr Kulkarni, learned counsel for the applicant also invited my attention to the Circular issued by this Court vide No. Rule/P.1605/2022 under the orders of High Court by the Registrar General dated 27.01.2022. He pointed out that the High Court has issued Circular in compliance of the order of the Hon'ble Supreme Court of India dated 16th April, 2021 passed in Suo Motu Writ Petition (Crl.) No. 2/2020 titled "***In Re : Expeditious trial of cases under section 138 of N.I. Act, 1881***". He submitted that in view of Circular issued by the High Court, it is mandatory on the part of the Magistrate to conduct the enquiry as prescribed under section 202 of Cr.PC when the accused resides beyond the territorial jurisdiction. As such, the impugned order of issue process is liable to be quashed and set aside.

9. Per contra, Mr Pramod Patil, learned counsel for respondent No.2 supported the impugned order of issue process by placing reliance on the decision in case of ***Sunil Todi and Ors. Vs. State of Gujarat and Anr. reported in 2021 SCC Online SC 1174***. He invited my attention to para No. 6 of the said decision and submitted that it is discretion of the

learned Magistrate to conduct enquiry under section 202 of Cr.PC and it is not a mandatory exercise when complaint and other documentary evidence is on record.

10. Mr Pramod Patil, learned counsel submitted that there is no legal defect in the impugned order. The application is liable to be dismissed.

11. Having regard to the submissions of both the sides and learned APP for the State, I have gone through the copy of complaint which is placed on record at Exh. A(Page No.30).

12. On going through the first page of the copy of complaint vide SCC No. 956/2019, it is evident that respondent No. 2/complainant is stated to be permanent resident of Chalisgaon, Dist. Jalgaon. Whereas present applicant/original accused is stated to be permanent resident of Aurangabad.

13. On perusing the order of issue process passed by the learned Magistrate, it would reveal that the learned Magistrate after perusing the complaint, verification statement in the form of affidavit and documents placed on record with the complaint, *prima facie* formed an opinion that the case under section 138 of the N.I. Act is made out against the applicant/accused. Accordingly, the process was issued against the accused/applicant under section 138 of the N.I. Act, 1881.

14. The Hon'ble Supreme Court in ***Suo Motu Writ Petition (Crl.) No. 2/2020 in para No. 24 has laid down the parameters in what way***

complaint under section 138 of the N.I.Act, 1881 should be dealt with. It would be appropriate to reproduce those parameters/guidelines laid down by the Hon'ble Supreme Court.

2. On receipt of any complaint under section 138 of N.I. Act, wherever it is found that any accused is resident of the area beyond the territorial jurisdiction of the magistrate concerned, an inquiry shall be conducted by the magistrate to arrive at sufficient grounds to proceed against the accused as prescribed under section 202 of Cr.P.C.

3. While conducting any such inquiry under section 202 of Cr.P.C., the evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the magistrate may restrict the inquiry to examination of documents without insisting for examination of witnesses for satisfaction as to the sufficiency of grounds for proceeding under the said provisions.

15. In view of clause (2) referred above, enquiry is made mandatory when the accused is resident of the area beyond the territorial jurisdiction of the Court. The enquiry under section 202 of Cr.PC is not discretionary, but it is mandatory in view of clear directions issued by the Hon'ble Supreme Court in clause (2) of the said order. Not only that, the Hon'ble Supreme Court has issued directions to all the High Courts to issue practice notes/directions to the Magistrates in this regard. Accordingly, this Court under the directions of the Hon'ble Chief Justice, Registrar General, has issued Circular vide No. Rule/P.1605/2022 wherein by clause No. 2 made it clear that on receiving the complaint under section 138 of the N.I. Act, wherever it is found that accused is resident of the area beyond territorial jurisdiction of the Magistrate concerned, an enquiry shall be conducted by the Magistrate to arrive at sufficient grounds to proceed

against the accused as prescribed under section 202 of Cr.PC.

16. Having regard to the mandate of the Constitution Bench decision of the Hon'ble Supreme Court and in view of binding precedent under Article 142 of the Constitution of India, the learned Magistrate Court has not left with any option, but to adhere to the guidelines and parameters laid down by the Hon'ble Supreme Court.

17. The learned counsel for respondent No. 2 has placed reliance in case of ***Sunil Todi and others***, more particularly, para No. 46 in order to support his submissions. According to Mr Patil, learned counsel for respondent No. 2, enquiry under section 202 of Cr.PC is discretionary and not mandatory.

18. I have gone through para No. 6 upon which learned counsel for respondent No. 2 has placed his reliance. Para No. 46 is in different context. It is held by the Hon'ble Supreme Court that evidence of witnesses on behalf of the complainant shall be permitted on affidavit if the Magistrate holds an enquiry himself, it is not compulsory that he should examine witnesses and in suitable cases, Magistrate can examine documents to be satisfied that there are sufficient grounds for proceedings under section 202 of Cr.PC . As such, the above said decision does not render any help to the case of respondent No.2.

19. This Court in Criminal Writ Petition No. 716/2019 Bench at Nagpur also held that enquiry under section 202 of Cr.PC is mandatory in view of Constitution Bench decision of the Hon'ble Supreme Court referred above.

20. Having regard to the above reasons and discussion and in view of legal position made clear by the Hon'ble Supreme Court in above referred case, the impugned order of issue process passed by the learned Magistrate (Court No.2), Chalisgaon dated 08.01.2020 is certainly bad in law and liable to be quashed and set aside.

21. At the same time, the directions can be issued to the Magistrate to complete the exercise of conducting the enquiry as contemplated under section 202 of Cr.PC and then proceed with the matter on its own merits.

ORDER

- (i) The Criminal Application is allowed as under :-
 - (a) The impugned order of issue process passed by the learned Judicial Magistrate First Class (Court No.2), Chalaisgaon, Dist. Jalgaon in SCC No. 956/2019 dated 08.01.2020 is hereby quashed and set aside.
 - (b) The Judicial Magistrate First Class (Court No.2), Chalisgaon may proceed in accordance with the decision delivered by the Hon'ble Supreme Court in case of Suo Motu Writ Petition (Crl.) No. 2/2020 and in view of Circular issued by the High Court of No. Rule/P.1605/2022 dated 27.01.2022.
 - (c) With the above directions, the application stands disposed of.

[SHRIKANT D. KULKARNI, J.]

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