IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1451 OF 2019

Nandkishor s/o Shamakant Sonar … Petitioner

Versus

1. Sow. Vrushali w/o Jitendriya Joshi (Sawleshwarkar)
2. The State of Maharashtra … Respondents

…

Mrs. Rashmi S. Kulkarni, Advocate for the petitioner.
Mr. H. I. Pathan, Advocate for respondent No.1.

…

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 05.07.2022

ORDER :-

. Present petition has been filed by the original accused invoking the Constitutional powers of this Court under Article 227 of the Constitution of India to challenge the order passed below Exhibit-1 dated 14.01.2019 in S.C.C. No.1734 of 2018 by learned Judicial Magistrate First Class, (Court No.4), Nanded regarding issuance of process under Section 138 of the Negotiable Instruments Act.

2. Heard learned Advocate Mrs. Rashmi S. Kulkarni for the petitioner and learned Advocate Mr. H. I. Pathan for respondent No.1.

3. Respondent No.1 is the original complainant who has filed the said complaint contending that the accused has committed offence under Section 138 of the Negotiable Instruments Act. It is her contention that towards the legally enforceable debt or liability the present petitioner – original accused issued cheque drawn on Central Bank of India, Antruli Branch, Jalgaon for Rs.1,60,000/-. It was presented by the complainant with her banker i.e. State Bank of India, Gurudwara Branch, Nanded, however, it was dishonoured on the ground that the payment is stopped by the drawer. She issued statutory notice on 24.07.2018 and it appears that it has been replied by the accused on 11.08.2018. Thereafter, she filed the said complaint before the learned Chief Judicial Magistrate, Nanded, who has made it over to learned Judicial Magistrate First Class, Court No.4, for its disposal according to law.

4. After perusal of the complaint, verification of the complainant and the documents on record, the learned Magistrate has issued process against the accused under Section 138 of the Negotiable Instruments Act by order dated 14.01.2019.

5. The only point that has been submitted on behalf of the petitioner is that the learned Magistrate has not followed the mandatory provisions

under Section 202 of the Code of Criminal Procedure, when the accused is admittedly not residing within the territorial jurisdiction of the learned Magistrate. The learned Advocate for the petitioner has relied on the decision in ***M/s. Vikrant Developers Vs. Rajendra Rajaram Basaiye,*** [Criminal Writ Petition No.121 of 2011 decided by this Court on 1406.2013], wherein it was specifically held by this Court that when the accused is residing beyond the local limits of the Magistrate, then in view of amendment made to Section 202 of the Code of Criminal Procedure in 2006 and in view of the decision by the Hon'ble Apex Court in ***National Bank of Oman Vs. Barakara Abdul Aziz, [(2013) 2 S.C.C. 488],*** the said inquiry under Section 202 of the Code of Criminal Procedure is mandatory.

6. Per contra, the learned Advocate appearing for respondent No.1 supported the order passed by the learned Magistrate and submitted that there was no necessity to hold inquiry under Section 202 of the Code of Criminal Procedure when the documents produced before the Magistrate were clearly showing that the accused has committed offence on its face value.

7. The point raised on behalf of the petitioner is now not *res integra* 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."*

8. In fact, the Division Bench of this Court in ***Barakara Abdul Aziz Vs. National Bank of Oman and Anr., [2012 ALL MR (Cri) 3825]*** had cleared the position of law that Section 202 of the Code of Criminal Procedure 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 when the accused is residing at a place beyond the jurisdiction of the Magistrate. It appears that the said decision taken by the Division Bench of this Court was then confirmed by the Hon'ble Apex Court in 2013, which was relied by this Court in ***M/S. Vikrant Developers (Supra).*** 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), National Bank of Oman (Supra), and M/S. Vikrant Developers (Supra)*** and, therefore, the said order suffers from legality and needs to be quashed.

9. Though the Suo Mutu Writ Petition (Supra) is the recent ruling, yet there are catena of judgments as aforesaid of this Court taking similar view and especially in ***Parth Bhadresh Mehta and others Vs. State of Maharashtra, [2019 (5) Mh.L.J. 771],*** 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 and in Suo Motu Writ Petition by the Hon'ble Apex Court to the Magistrate that in suitable cases 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. Hence, the following order :-

<u>ORDER</u>

I) The writ petition stands partly allowed.

II) The order of issuing process passed in S.C.C. No.1734 of 2018 dated 14.01.2019 by learned Judicial Magistrate First Class, (Court No.4), Nanded for the offence punishable under Section

138 of the Negotiable Instruments Act is hereby set aside.

III) The matter is 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 is residing beyond the jurisdiction of the Magistrate.

[SMT. VIBHA KANKANWADI, J.]

scm