IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.3540 OF 2021

1. M/s.Matoshri Laxmi Sugar Co-Generation
Industries Limited, Registered Office at
Satling Nagar, At Ruddewadi, Post Dudhani,
TalAkkalkot, Dist.Solapur-413220.
2. Siddharam Satlingappa Mhetre,
Age 61 years, R/o.At 178/11,
Jodhbhavi Peth, Solapur-413002.
3. Datta Balbhim Shinde, Age 38 years,
R/o.D-6/7, Vidya Vihar Apartment,
Railway Lines, Solapur.
4. Gokul Dattatraya Shinde, Age 59 years,
R/o.D-6/7, Vidya Vihar Apartment,
Railway Lines, Solapur.
5. Shivraj Siddharam Mhetre,
Age 32 years,
R/o.At 178/11,
Jodhbhavi Peth, Solapur-413002. Petitioners

versus

1. Punjab National Bank,
Registered office at :
Asset Recovery Management Branch (ARMB),
Pune at Aurora Towers, 9, Moledina Road,
Camp, Pune-411, through its
Chief Manager and Representative
Mr.Virendra Kumar Singh.
2. The State of Maharashtra. Respondents

WITH
CRIMINAL WRIT PETITION NO.3542 OF 2021

1. Gokul Sugar Industries Limited,
Registered Office at,
157, Nandini Complex, Morarji Peth,
Lucky Chowk, Solap;ur-413001.
2. Siddharam Satlingappa Mhetre,
Age 61 years, R/o.At 178/11,
Jodhbhavi Peth, Solapur-413002.
3. Gokul Dattatraya Shinde, Age 59 years,
R/o.D-6/7, Vidya Vihar Apartment,

Railway Lines, Solapur.
4. Datta Balbhim Shinde, Age 38 years,
R/o.D-6/7, Vidya Vihar Apartment,
Railway Lines, Solapur.
5. Ganpat Dattatray Shinde, Age 63 years,
R/o.D-6/7, Vidya Vihar Apartment,
Railway Lines, Solapur.
6. Shivraj Siddharam Mhetre,
Age 32 years,
R/o.At 178/11,
Jodhbhavi Peth, Solapur-413002.
7. Kapil Balbhim Shinde, Age 34 years,
R/o.D-6/7, Vidya Vihar Apartment,
Railway Lines, Solapur.

Mr.Ajit V. Alange, Advocate for Petitioners.
Ms.Payal Upadhyay i/by ANP Chambers, Advocate for Respondent no.1.
Mr.S.R.Agarkar, APP, for Respondent-State.

CORAM : PRAKASH D. NAIK, J.

DATE : 12th August 2022

PC :

1. Petitioners in Criminal Writ Petition No.3540 of 2021 are challenging order dated 20th January 2021 passed by learned Judicial Magistrate First Class, Cantonment Court, Pune in S.C.C No.1188 of 2020, whereas Petitioners in Criminal Writ Petition No.3542 of 2021 are challenging order dated 20th January 2021 passed by learned Judicial Magistrate First Class, Cantonment Court, Pune in S.C.C No.1187 of 2020.

2. Brief allegations in S.C.C No.1188 of 2020 are that the complainant is a nationalized bank. Accused no.1 is a company. Accused nos.2 to 7 are directors of accused no.1. Accused nos.3, 5, 6 and7 are looking after day to day transactions/business of accused

no.1 and also responsible for business of accused no.1. Accused wanted to avail credit facility. The complainant sanctioned loan facilities to accused. In discharge of liability the accused no.1 issued cheque no.173463 for Rs.19 crores. Cheque was signed by accused no.7. Cheque was returned with remarks `funds insufficient'. Demand notice was forwarded to the accused. Complaint was filed on 13th March 2020.

3. Learned Judicial Magistrate First Class, Cantonment Court, Pune issued process against accused nos.1,3,5,6 and 7 u/s.138 of Negotiable Instruments Act in S.C.C No.1188 of 2020 vide order dated 20th January 2021.

4. Brief allegations in S.C.C No.1187 of 2020 are that the complainant is a nationalized bank Accused no.1 is a company registered under Indian Companies Act. Accused wanted to avail credit facilities. Complainant processed and sanctioned loan facilities to the accused on 21st October 2015. The cash credit facilities of Rs.90 crores was sanctioned to the accused. In discharge of liability accused issued cheque no.952821 dated 31st December 2019 for Rs.15.22 crores. The cheque was returned with remarks "funds insufficient". Demand notice was issued to accused. Complaint was filed on 13th March 2020.

5. Vide order dated 20th January 2021 learned Judicial Magistrate First Class, Cantonment Court, Pune, issued process in S.C.C No.1187 of 2020 against accused nos.1 to 9 for the offence u/s.138 of Negotiable Instruments Act (`N.I.Act).

6. The common grounds urged by learned advocate for Petitioners in these petitions is that complaints were filed before the Court of Judicial Magistrate First Class, Cantonment Court, Pune. The accused are residents of Solapur. Thus, accused were residing beyond the jurisdiction of the Court. Learned Magistrate ought to have conducted inquiry u/s.202 of Cr.P.C. Accused are not involved in day to day affairs of accused no.1. There is no material to invoke Section 141 of N.I.Act against accused. The directors are not vicariously liable for accused no.1 company.

7. Reliance is placed on following decisions :-

(a) Re : Expeditious Trial of cases under Section 138 of N.I.Act, Suo Motu Writ Petition (Cri.) No.2 of 2020;

(b) Vijay Dhanuka & others Vs. Najima Mamtaj and others (2014)14-SCC-638;

(c) Abhijit Pawar Vs Hemant Madhukar Nimbalkar & others (2017)3-SCC-528;

(d) Pooja Ravinder Devidasani Vs. State of Maharashtra & ors. (2014)16-SCC-1;

(e) Ravindranatha Bajpe Vs. Mangalore Special Economic Zone Ltd. And others – decision of Supreme Court in Criminal Appeal Nos.1047-1048/2021, dated 27th September 2021;

(f) S.M.S.Pharmaceuticals Ltd. Vs. Neeta Bhalla and another (2007)4-SCC-70.

8. Learned advocate for Respondent no.1 submitted that there was sufficient material to invoke Section 141 of N.I.Act against accused. Learned Magistrate has perused the material on record and issued process against accused. It is not mandatory to conduct inquiry u/s.202 of Cr.P.C in relation to complaints u/s.138 of N.I.Act.

The decision in the case of Re : Expeditious Trial of Cases under Section 138 of N.I.Act, Suo Motu Writ Petition (Cri.) No.2 of 2020, cannot be applied to the present case. It is prospective. The decision has no retrospective effect. The order issuing process reflects application of mind. Respondent no.1 has filed affidavit-in-reply opposing relief sought in this petition. It is submitted that Petitioners did not respond to the legal notice sent on behalf of complainant. The credit facilities are availed of by company from complainant by execution of various documents. Petitioners have played vital role in the transactions in respect to which cheques were issued. The grounds urged by Petitioners are based on disputed questions of facts. Hence petitions may be dismissed.

9. This Court in several decisions has taken a view that inquiry under Section 202 of Cr.P.C is not mandatory in proceedings u/s.138 of N.I.Act. The order issuing process in the present case was issued on 20th January 2021. The decision of Supreme Court in the case of Re : Expeditious Trial of Cases under Section 138 of N.I.Act, Suo Motu Writ Petition (Cri.) No.2 of 2020 was delivered on 16th April 2021. From the tenor of the decision it is clear that it is not retrospective. Even otherwise, the impugned order passed by learned Magistrate reflects application of mind and does not warrant interference.

10. In the decision of Supreme Court in the case of Abhijit Pawar Vs. Hemant Madhukar Nimbalkar and others (supra) the offences were under IPC wherein the Court held that inquiry u/s.202 of IPC is mandatory in the event accused are residing beyond the jurisdiction of Trial Court.

11. In Re : Expeditious Trial of Cases Under Section 138 of N.I.Act, 1881 (supra), concerned with the large number of cases filed under Section 138 of the N.I.Act, pending at various levels the Supreme Court decided to examine the reasons for the delay in disposal of those cases. The registry was directed to register a suo motu writ petition captioned as “Expeditious Trial of cases under Section 138 of N.I.Act, 1881”. It was noted that pendency of complaints filed under Section 138 of the Act had an adverse effect in disposal of other criminal cases. There was an imminent need for remedying the situation which was addressed by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. Sections 143 to 147 were inserted in the Act, which came in to force on 6th February 2003. The situation has not improved, as Courts continue to struggle with pendency of complaints under Section 138 of the Act. The Court considered the aspect of conversion of summary trial to summons trial, inquiry under Section 202 of the Code, interpretation of Section 202(2) which stipulated that the Magistrate shall take evidence of the witness on oath in an inquiry conducted under Section 202(1) for the purpose of issuance of process, Section 219 and 220 of the Code etc. In relation to Section 202 of the Code, it was observed that Section 202 of Code confers jurisdiction on the Magistrate to conduct an inquiry for the purpose of deciding whether sufficient grounds justifying issuance of process has been made out. The amendment to Section 202 of Code w.e.f 23rd June 2006 made it mandatory for the Magistrate to conduct inquiry before issuance of process in a case where the accused resides beyond the area of jurisdiction of Court. Reference was made to the decisions in the case of Vijay Dhanuka and others Vs. Najima Mamtaj and others

(supra), Abhijit Pawar Vs. Hemant Madhukar Nimbalkar and another, and Birla Corporation Limited Vs. Advent Instruments and Holdings Limited and others (2019)16-SCC-610. It was further observed that 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 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 material available on record. The Court then referred to submissions of learned Amicus Curiae that there was a discussion about requirement of inquiry under Section 202 of the Code in relation to complaints filed under Section 138 in the judgment of Supreme Court in K.S.Joseph Vs. Philips Carbon Black Ltd and another (2016)11-SCC-105, but the question of law was left open. In view of judgments of Court in Vijay Dhanuka (supra), Abhijeet Pawar (supra) and Birla Corporation (supra), the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside jurisdiction of the Court, cannot be dispensed with. The learned Amicus Curiae recommended that the Magistrate should come to a conclusion after holding an inquiry that there are sufficient grounds to proceed against the accused. The Court accepted the submission. The

Supreme Court issued certain guidelines in paragraph 24, which reads as follows :

> ***"24. The upshot of the above discussion leads us to the following conclusions :***
>
> *1) The High Courts are requested to issue practice directions to the Magistrates to record reasons before converting trial of complaints Under Section 138 of the Act from summary trial to summons trial.*
>
> *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.*
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> *4) We recommend that suitable amendments be made to the Act for provision of one trial against a person for multiple offences Under Section 138 of the Act committed within a period of 12 months, notwithstanding the restriction in Section 219 of the Code;*
>
> *5) The High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint Under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonour of cheques issued as part of the said transaction.*
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> *6) Judgments of this Court in Adalat Prasad (supra) and Subramanium Sethuraman (supra) have interpreted the law correctly and we reiterate that there is no inherent power of Trial Courts to review or recall the issue of summons. This does not affect the power of the Trial Court Under Section 322 of the Code to revisit the order of issue of process in case it is brought to the court's notice that it lacks jurisdiction to try the complaint.*

> *7) Section 258 of the Code is not applicable to complaints Under Section 138 of the Act and findings to the contrary in Meters and Instruments (supra) do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the Trial Courts to reconsider/recall summons in respect of complaints Under Section 138 shall be considered by the Committee constituted by an Order of this Court dated 10.3.2021.*
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> *8) All other points, which have been raised by the Amicus Curiae in their preliminary report and written submissions and not considered herein, shall be the subject matter of deliberation by the aforementioned Committee. Any other issue relating to expeditious disposal of complaints Under Section 138 of the Act shall also be considered by the Committee."*

12. It is pertinent to note that lakhs of complaints are pending in the Courts within the State of Maharashtra. Prior to the aforesaid decision of Supreme Court, there were divergence of opinion amongst High Court on the said issue which fact has been noted by Supreme Court in paragraph 10 of the above decision stating that there has been a divergence of opinion amongst High Courts relating to the applicability of Section 202 in respect of complaints under Section 138 of N.I.Act. Certain cases are decided holding that inquiry is mandatory and contrary views are expressed in other cases. It is not observed that cases which are pending since long and process has been issued without complying Section 202 of the Code, the order issuing process would vitiate. It is relevant to note that in some cases the evidence has been recorded and the cases have reached at different level. On the contrary, directions were issued that inquiry shall be conducted on receipt of complaint, 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, and for 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 and in suitable cases the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witness. From the tenor of directives it is evident that the directives were prospective in nature. In fact, this Court had issued circular dated 27th January 2022 in compliance with aforesaid decision to the Magistrates having jurisdiction to try offences under the N.I.Act. The practice direction no.2 in the aforesaid circular states that `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. The circular also indicate that directions are prospective.

13. The decision in the case of Vijay Dhanuka etc. (supra) was delivered on 27th March 2014 in a complaint relating to the offence u/s.323, 380, 506 read with 34 of IPC. It was held that in a case in which the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, it is mandatory to conduct inquiry or investigation. However, it was further observed that every inquiry other than a trial conducted by the Magistrate is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the case before the Court, in inquiry under Section 202 of the Code, two witnesses were examined and thereafter the Magistrate had directed issuance of process. 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. It was also observed that 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.

14. Prior to the decision of Hon'ble Supreme Court in the case of Re : Expeditious trial of cases under Section 138 of N.I.Act, there has been divergence of opinion by this Court on the issue of inquiry under Section 202 of Code in complaints under Section 138 of N.I.Act. In <u>Bansilal Kabra Vs. Global Trade Finance Ltd and another (supra</u>), this Court has observed that though the word `shall' has been used in the amended provision of Section 202(1) and it is followed after the word "may" which is used that would not be the only criteria for the purpose of determining the said provision as mandatory or directory. The purpose behind incorporating the said provision in the amended section was to ensure that the learned Magistrate does not mechanically issue the process but applies his mind to the facts of the case to the averments made in the complaint to the statement made by the complainant and his witnesses under Section 202 and thereafter if a doubt still remains in his mind, he can himself consider this by holding an inquiry in order to ascertain whether a prima facie case is made out or not against the accused who are residing beyond the jurisdiction of the Magistrate. The inquiry which has to be made in a complaint which is filed under Section 138 itself, is very limited to certain documents and averments in the complaint. It cannot be said that in each and every case, the Magistrate after recording the statement of the complainant and his witnesses should again postpone the issuance of process and

again hold a fresh inquiry by asking the complainant to adduce further evidence. While interpreting the provisions of Section 202 of Cr.P.C, the provisions of N.I.Act also have to be taken into consideration. Though the legislature has used the word `shall' in the amendment, it cannot be treated as mandatory direction but a directory one and the discretion would vest in the Magistrate to consider where in cases the accused resides outside his jurisdiction, whether it is necessary to postpone the issuance of process or not depending on facts of each case. The Court disagreed with the contrary view taken in the case of Capt.S.C.Mathur and another Vs. M/s.Elektronik Lab and others in Criminal Application No.2640 of 2009 and in Satish @ Rajendra Harbans Tiwari (supra) and the matter was referred to Division Bench. Thereafter this Court in the case of Dr.Rajul Ketan Raj Vs. Reliance Capital Limited and another took a similar view.

15. In the case of Vijay Tata Ravipati Vs. Mediascope Publicitas (India) Pvt. Ltd and another (supra), decided by me, it was argued that Section 202 of Cr.P.C is not complied by the Magistrate. The case was relating to the offence u /s.138 of N.I.Act. After taking into consideration several decisions it was held that the amended provision of Section 202 of Cr.P.C in consonance with Section 138 of N.I.Act is directory. In the case of Blackburn Metals Vs. Zep Engineering Works and others (Order dated 6-10-2021 in Criminal Application No.1768 of 2019), this Court has once again considered the issue relating to compliance of Section 202 of Cr.P.C in a complaint u/s.138 of N.I.Act and it was held that learned Magistrate while issuing process has personally verified the complaint, perused the documents filed along with it and after taking into consideration

statement of complainant on oath and upon hearing the advocate for complainant, held that there were sufficient ground for proceeding against accused. The Magistrate has not only verified the complaint and heard the complainant's advocate but also perused the documents filed along with the complaint for obtaining satisfaction as to sufficiency of grounds for proceeding under Section 202. Reference was made to the decisions of this Court in the case of Bansilal Kabra (supra), Dr.Rajul Ketan Raj (supra), Girish Dharamchand Chordiya Vs. Neeta Sachin Chandak (Criminal Writ Petition No.997 of 2017), Vijay Dhanuka Vs. Najima Mamtaj (supra) and Re : Expeditious trial of cases under Section 138 of N.I.Act. The Court then referred to observations in paragraph 12 of Supreme Court decision in Re : Expeditious Trial of cases under Section 138 of N.I.Act and observed that the dictum is when Magistrate holds inquiry himself, it is not compulsory that he should examine the witnesses and in suitable cases the Magistrate can examine documents for satisfaction as to the sufficiency of grounds for proceeding under Section 202. It was further observed that in the case before the Court, the order of process shows that the learned Magistrate has not only verified the complaint and heard the complainant's advocate but also perused the documents filed along with the complaint for obtaining satisfaction as to sufficiency of ground for proceeding under Section 202. Thus, in consideration of the law laid down by this Court making distinction between the complaint u/s.138 of the Act and complaints for offences under IPC, in the case of Rajul Ketan Raj (supra) and Girish Chordiya (supra) and the order passed in Suo Motu Writ Petition No.2 of 2020 and particularly observations made in paragraph nos.10, 11 and 12, issue of process cannot be faulted with for want of inquiry under Section

202(1) of the Code. The complaint in question was filed along with requisite documents viz invoices, delivery challans, transporters receipts, copy of cheque, notice, reply. Though the accused were residing beyond the territorial jurisdiction of the learned Magistrate, and although he did not postpone the issuance of process, the Magistrate has obtained requisite satisfaction from documents on record as to sufficiency of the grounds for proceeding under Section 202 against accused.

16. In the context of observation of this Court in the case of Blackburn Metals (supra), the observations of Supreme Court in paragraph 12 in the decision of Re : Expeditious trial of cases under Section 138 of N.I.Act needs to be quoted, which reads as follows :

> *"Another point that has been brought to our notice relates to the interpretation of Section 202(2) which stipulates that the Magistrate shall take evidence of the witness on oath in an inquiry conducted under Section 202(1) for the purpose of issuance of process. Section 145 of the Act provides that the evidence of the complainant may be given by him on affidavit, which shall be read in evidence in any inquiry, trial of other proceedings, notwithstanding anything contained in the Code. Section 145(2) of the Act enables the Court to summon and examine any person giving evidence on affidavit as to the facts contained therein, on an application of the prosecution or the Accused. It is contended by the learned Amici Curiae that though there is no specific provision permitting the examination of witnesses on affidavit, Section 145 permits the complainant to be examined by way of an affidavit for the purpose of inquiry under Section 202. He suggested hat Section 202(2) should be read along with Section 145 and in respect of complaints under Section 138, the examination of witnesses also should be permitted on affidavit. Only in exceptional cases, the Magistrate may examine the witnesses personally.*

Section 145 of the Act is an exception to Section 202 in respect of examination of the complainant by way of an affidavit. There is n specific provision in relation to examination of the witnesses also on affidavit in Section 145. It becomes clear that Section 145 had been inserted in the Act, with effect from the year 2003, with the laudable object of speeding up trials in complaints filed under Section 138. If the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. On a holistic reading of Section 145 along with Section 202, we hold that Section 202(2) of the Code is inapplicable to complaints under Section 138 in respect of examination of witnesses on oath. The evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses. In suitable cases, the Magistrate can examine documents for satisfaction as to the sufficiency of grounds for proceeding under Section 202."

17. In a subsequent decision in the case of Sunil Todi and others Vs. State of Gujarat and another (supra), one of the submission before Supreme Court was that Section 202 of Cr.P.C was not complied although accused were residing beyond jurisdiction of the concerned Court. No inquiry was carried out by Magistrate. The Court dealt with the issue whether the Magistrate, in view of Section 202 of Cr.P.C, ought to have postponed the issue of process. The complaint was related to offence under Section 138 of N.I.Act. The Supreme Court referred to Section 202 of Cr.P.C and observed that under sub-Section (1) of Section 202, a Magistrate upon receipt of a complaint of an offence of which he is authorised to take cognizance is empowered to postpone the issuance of process against the accused and either (i) inquire into accused and, (ii) direct an investigation to be made by a police officer or by such other person

as he thinks fit. The purpose of postponing the issuance of process for the purposes of an inquiry or investigation is to determine whether or not there is sufficient ground for proceeding. However, it is mandatory for the Magistrate to do so in a case where the accused is residing at a place beyond the area in which the Magistrate exercises jurisdiction. The accused in that case were from Aurangabad and complaint was filed at Mundra. The Court referred to decisions in the case of Vijay Dhanuka Vs. Najima Mamtaj (supra), Abhijeet Pawar Vs. Hemant Nimbalkar, Birla Corporation Ltd Vs. Advent 2 Investment and Holdings, Mehmood Ul Rehman Vs. Khazir Mohammad Tunda (2015)12-SCC-420, and Re : Expeditious Trial of cases under Section 138 of N.I.Act. It would be relevant to quote observations in paragraphs 38, 46, 47 and 48 :

> *"38. The provisions of Section 202 which mandate the Magistrate, in a case where the accused is residing at a place beyond the area of its jurisdiction, to postpone the issuance of process so as to enquire into the case himself or direct an investigation by police officer or by another person were introduced by Act 25 of 2005 with effect from 23 June 2006. The rationale for the amendment is based on the recognition by Parliament that false complaints are filed against persons residing at far off places as an instrument of harassment. In Vijay Dhanuka v. Najima Mamtaj (2014) 14 SCC 638, this Court dwelt on the purpose of the amendment to Section 202, observing:*
>
> > *" 11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process 'in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction' and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in*

which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

12. The words 'and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction' were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far-off places in order to harass them. The note for the amendment reads as follows :

'False complaints are filed against persons residing at far-off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.'

The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of *the Magistrate."*

46. Section 145 of the NI Act provides that evidence of the complainant may be given by him on affidavit, which shall be read in evidence in an inquiry, trial or other proceeding notwithstanding anything contained in the CrPC. The Constitution Bench held that Section 145 has been inserted in the Act, with effect from 2003 with the laudable object of speeding up trials in complaints filed under Section 138. Hence, the Court noted that if the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. Consequently, it was held that Section 202(2) CrPC is inapplicable to complaints under Section 138 in respect of the examination of witnesses on oath. The Court held that the evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses and in suitable cases the Magistrate can examine documents to be satisfied that there are sufficient grounds for proceeding under Section 202.

47. In the present case, the Magistrate has adverted to:
(i) The complaint;
(ii) The affidavit filed by the complainant;
(iii) The evidence as per evidence list and; and
(iv) The submissions of the complainant

48. The order passed by the Magistrate cannot be held to be invalid as betraying a non- application of mind. In Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal (2003) 4 SCC 139 this Court has held that in determining the question as to whether process is to be issued, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can only be determined at the trial. [See also in this context the decision in Bhushan Kumar v. State (NCT of Delhi) (2012) 5 SCC 424]. "

18. I do not find any infirmity in the order issuing process passed by Court. Apart from the fact that decision in the case of Re:

Expeditious trial of cases u/s.138 of N.I.Act is prospective, the order issuing process is in consonance with decision of Hon'ble Supreme Court in the case of Sunil Todi Vs. State of Gujarat (supra). This Court in order dated dated 4th August 2022 passed in the case of M/s.Mohan India Pvt.Ltd. Vs. National Spot Exchange Ltd and other connected matters has taken a view that the decision in the case of Re : Expeditious trial is having prospective effect.

19. The decisions of Supreme Court in the case of Pooja Ravinder Devidasani Vs. State of Maharashtra and others (supra) and Ravindranatha Bajpe Vs. Mangalore Speial Economic Zone Ltd and others (supra) SMS Pharmaceuticals Ltd. Vs. Neeta Bhalla and another deal with the issue relating to vicarious liability of Directors towards company. It is the settled law that directors of company or any other officer, if responsible for day to day affairs of the accused company, then he/they can be held vicariously liable by invoking Section 141 of N.I.Act.

20. In S.C.C No.1188 of 2020 it is stated that accused nos.2 to 7 are directors of accused no.1 and accused nos.3,5,6 and 7 are looking after day to day transactions of it. Learned Learned Magistrate had issued process against accused nos.1,3,5,6 and 7. From the affidavit-in-reply filed by Respondent no.1 in Criminal Writ Petition No.3540 of 2021 which deals with S.C.C No.1188 of 2020, it is stated that the Petitioner No.1 i.e. M/s.Matoshri Laxmi Sugar Co-Generation Industries Ltd has availed aforesaid various Credit facilities from the Respondent no.1 by way of execution of various loan documents. Petitioner No. 2 i.e. Mr.Siddharam Satlingappa Mhetre is a Director of the Petitioner No.1 Company since past 13 ½

years (Date of Appointment - 09.05.2008). He is also the Chairman and authorized signatory of the Petitioner No. 1 who, along with Mr. Datta Balbhim Shinde, the Petitioner No. 3 was jointly and severely authorized by the Petitioner No.1 Company to execute the loan documents and related papers on behalf of the Petitioner No.1 and thus is in charge of and responsible for the day to day management/ affairs of the Petitioner No.1 Company. Petitioner Nos. 2, 3, 4 & 5 have duly executed the Letter of Acceptance to stand as Guarantors for the Respondent no.1 and Deed of Guarantees dated 03.11.2011 and 02.01.2013 in favour of the lenders including the Respondent no.1. Petitioner No. 2,3,4 & 5 have also executed the Mortgage Deeds in favour of the lenders. Petitioner no.3 i.e. Mr. Datta Balbhim Shinde was the Managing Director and signatory of the Petitioner No.1 Company from 11.06.2009 till 16.09.2021 and was in charge of and responsible for the day to day management/affairs of the Petitioner No.1 Company including at the time of dishonour of the said cheque. Further, the Petitioner No.3 has also executed the aforesaid mentioned Deeds of Guarantee and Mortgage Deeds in favour of the lenders. That Petitioner No.4 i.e. Mr. Gokul Dattatreya Shinde is a Director of the Petitioner No.1 Company since its incorporation date i.e. 09.05.2008. He is also the Vice Chairman and signatory of the Petitioner No.1 Company. He is the Vice Chairman of the said Petitioner No.1 Company since 09.05.2008 and is in charge of and responsible for the day to day management/affairs of the Petitioner No.1, Company. Further, the Petitioner No.4 has also executed the aforesaid mentioned Deeds of Guarantee and Mortgage Deeds in favour of the lenders including the answering Respondent. The answering Respondent further states that the Petitioner No.5 i.e. Mr.Shivraj Siddharam Mhetre is the signatory of the said dishonoured Cheque. The Petitioner No.5 is the Director of the said Company since 11.06.2009 and is in charge of and responsible for the day to day management/affairs of the Petitioner No.1 Company. Further, the Petitioner No.5 has also executed the aforesaid mentioned Deeds of Guarantee and Mortgage Deeds in favour of the lenders.

21. In view of the aforesaid facts the contentions of petitioners cannot be accepted. Their defense will have to be tested in trial.

22. Affidavit-in-reply filed in Criminal Writ Petition No.3542 of 2021 which relates to S.C.C No.1187 of 2020 refers to role played by petitioners in transactions. In the reply it is stated that the Petitioner No. 2 i.e. Mr. Siddharam Satlingappa Mhetre is the Director and authorized signatory of the Petitioner No.1 who, along with Mr. Datta Balbhim Shinde, the Petitioner No. 4 was jointly and severely authorized by the Petitioner No.1 Company to execute the loan documents and related papers on behalf of the Petitioner No. 1 and thus is in charge of and responsible for the day to day management/ affairs of the Petitioner No.1 Company. Petitioner Nos. 2, 3, 4, 5, 6 & 7 have duly executed the Deed of Guarantee dated 22.12.2014 and 27.10.2015 in favour of the lenders. Petitioner Nos. 3, 4, 5, 6 & 7 have also executed the Mortgage Deeds dated 23.12.2014 & 27.10.2015 in favour of the lenders. Petitioner No.3, i.e. Mr. Gokul Dattatraya Shinde is the signatory of the Petitioner No. 1 Company since 17.04.2008 and is in charge of and responsible for the day to day management affairs of the Petitioner No.1 Company. Further the Petitioner No. 3 has also executed the aforesaid Deeds of Guarantee and Mortgage Deeds in favour of the lenders.

Petitioner No. 4 i.e. Mr. Datta Balbhim Shinde is the signatory of the said dishonoured Cheque. He is the Managing Director of the said Petitioner No.1 Company since 17.04.2008 and is in charge of and responsible for the day to day management/affairs of the Petitioner No.1 Company. Further, the Petitioner No.4 has also executed the aforesaid mentioned Deeds of Guarantee and Mortgage Deeds in favour of the lenders. Petitioner No.5 i.e. Mr.Ganpat Dattatraya Shinde is the Director and signatory of the Petitioner No.1 Company since 17.04.2008 and is in charge of and responsible for the day to day management/affairs of the Petitioner No.1 Company. Further, the Petitioner No. 5 has also executed the aforesaid mentioned Deeds of Guarantee and Mortgage Deeds in favour of the lenders. Petitioner No.6 i.e. Mr.Shivraj Siddharam Mhetre was the Director and signatory of the Petitioner No.1 Company from 07.02.2011 (Appointment Date) till 27.08.2018 (Cessation Date) and it is pointed out that he was the Director of the Petitioner No.1 Company at the relevant time when the aforesaid loan documents and Deed of Guarantee and Mortgage Deed were executed and stood as one of the Guarantors on behalf of the Petitioner No.1 company. and continues to be a personal guarantor. Further, the said account was declared as NPA on 31.12.2016 which is during his directorship and when he was very much in charge of and responsible for the day to day management/affairs of the Petitioner No.1 Company. Petitioner No.7 i.e. Mr.Kapil Balbhim Shinde is the CFO (KMP) and signatory of the Petitioner No.1 Company since 23.03.2017 and is in charge of and responsible for the day to day management/affairs of the Petitioner No.1 Company. Further, the Petitioner No.7 has also executed the aforesaid mentioned Deeds of Guarantee and Mortgage Deeds in favour of the lenders.

23. In view of the aforesaid factual aspects relating to the role played by petitioners, the contention of petitioners cannot be accepted that they have no role to play in the transactions and that Section 141 of N.I.Act cannot be invoked against them.

24. In the circumstances both the petitions are required to be dismissed.

ORDER

(i) Criminal Writ Petition No.3540 of 2021 is rejected and disposed off;

(ii) Criminal Writ Petition No.3542 of 2021 is rejected and disposed off.

(PRAKASH D. NAIK, J.)

MST