

CRIMINAL APPLICATION N.194 OF 2022
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CRIMINAL APPLICATION NO.214 OF 2022
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CRIMINAL APPLICATION NO.225 OF 2022
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CRIMINAL APPLICATION NO.224 OF 2022

WITH
CRIMINAL APPLICATION NO.222 OF 2022

WITH
CRIMINAL APPLICATION NO.213 OF 2022

M/s.Brinda Commodity Pvt.Ltd and another	Applicants
versus	
National Spot Exchange Ltd and another	Respondents

Mr.Kevik Setalwad, Senior Advocate, with Mr.Vinay Bhanushali with Mr.Vijay Singh with Ms.Bhagyashree Ganwani, Advocates for

Applicants.

Mr.Yashpal Thakur, Nimeet Sharma, Muddassar Bagadia i/by MZM Legal LLP, Advocate for Respondent no.1.

Mr.S.R.Agarkar, APP, for Respondent-State.

CORAM : PRAKASH D. NAIK, J.

DATE : 4th August 2022

PC :

1. The applicants in all these applications are prosecuted for offence under Section 138 of Negotiable Instruments Act, 1881 ('N.I.Act' for short). The applicants are aggrieved by order issuing process passed by learned Magistrate for offence u/s.138 of N.I. Act and the order passed by Sessions Court rejecting the Revision Applications challenging the order of process.

2. The complaints in all the cases were similar. The complainant is a company incorporated under The Companies Act and carries on business as a Spot Exchange providing for an electronic trading platform for spot contracts in commodities and compulsory delivery basis. The accused M/s.Mohan India Pvt.Ltd Company is a trading-cum-clearing member of the complainant. The other accused are Directors of accused no.1. The accused no.1 was a trading-cum-clearing member admitted by the complainant and had been conferred with rights to trade and clear through clearing house of complainant and was allowed to make deals for himself as well as on behalf of his clients and clear and settle such deals. The Government of India directed complainant to furnish an undertaking that all existing contracts will be settled on due dates and no fresh contracts will be launched. The complainant submitted undertaking on 15th July 2013 shortening the delivery period to 10 days in all contracts.

In order to safeguard interests of all participants and market in general, the complainant issued Circular dated 31st July 2013 suspending all the transactions on the exchange with effect from 31st July 2013 by merging the delivery and settlement of all pending contracts and differing it for a period of 15 days. Consequently it was directed that the positions outstanding in the contracts would be settled by way of delivery and payment after expiry of 15 days. In view of the outstanding with respect to accused no.1 and its sister concerns, vis-a-vis 'Tavishi Enterprises Pvt. Ltd; Brinda Commodity Pvt. Ltd' the whole of the amount payable at the exchange platform, in view of the various transactions of sugar amounted to Rs.922 crores. Since payment crisis had arisen due to default in payment, with a view to solve the issue settlement agreement was executed on 30th October 2013. As per settlement agreement amount payable by the accused is Rs.771 crores and the amount was payable by accused in installments Rs.250 crores payable by accused on or before 30th June 2014 was defaulted and an amount of Rs.221.15 crores remained unpaid on 24th August 2014. The accused issued post dated cheques. The complainant deposited cheques. The cheques were returned unpaid with memo with remarks "funds insufficient". Demand notice was sent. Complaints were filed for the offence under Section 138 of Negotiable Instruments Act ('N.I.Act'). Verification statement was recorded. Process was issued against the accused.

3. The accused challenged the order issuing process by preferring Criminal Revision Applications before the Court of Sessions for Greater Bombay. Vide common order dated 30th October 2021, the applications were rejected.

4. Learned Senior Advocate Mr.Setalwad appearing for applicants submitted as under :

(i) The settlement agreement dated 30th October 2013 was the basis of issuance of cheques and since the settlement agreement could be effective only when the Forward Market Commission approved the same and since the Commission did not approve the settlement agreement, the cheques cannot be said to have been issued for discharge of legally enforceable debt;

(ii) The settlement agreement was subject to approval of Forward Market Commission and it is admitted position that Forward Market Commission refused to grant approval to settlement agreement. Since Forward Market Commission did not approve the said agreement vide letter 11th April 2014, there was no legally enforceable debt arising from the said settlement agreement in favour of complainant;

(iii) The Revisional Court has mechanically rejected the revision applications without considering the legal issues involved in this case;

(iv) The question which arises for consideration and which ought to have been considered by the Court, is whether the proceedings u/s.138 of N.I.Act would apply in case of cheques issued for settlement. The Court is required to examine whether there is legally enforceable liability. The cheques were issued in advance. The complainant had deposited cheques and then proceeded to file complaint since cheques were dishonoured;

(v) The cheques were issued by way of security. Hence the proceedings under Section 138 of N.A.Act are not maintainable;

(vi) The mandatory requirement of Section 202 of Cr.PC has not been complied in the present case and thus, the order issuing

process is bad in law. The accused were residents beyond the territorial jurisdiction of Trial Court and it was necessary to comply Section 202 of Cr.PC;

(vii) The order issuing process was obtained by suppressing vital facts;

(viii) The order of process was passed without application of mind;

(ix) The Sessions Court failed to acknowledge that the Supreme Court in *Suo Motu Writ Petition (Cri).2 of 2020* has issued guidelines for expeditious trial of cases under Section 138 of N.I.Act. The Courts are directed to comply Section 202 of Cr.PC;

(x) It would be an error to hold that directions issued by Supreme Court to conduct inquiry under Section 202 of Cr.PC is not applicable in pending cases and the directions are prospective;

(xi) The law declared by Supreme Court is presumed to be the law at all times. The decisions of Supreme Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency. The judgment in *Suo motu Writ Petition (Cri).2 of 2020 (Re : Expeditious trial of cases under Section 138 of N.I.Act)* does not stipulate that it will have prospective application;

(xii) Perusal of complaint and verification statement is not enough to comply requirement of Section 202 of Cr.PC;

(xiii) It is for the Court to indicate as to whether the decision in question will operate prospective. There shall be no prospective overruling, unless it is so indicated in the particular decision.

5. Learned counsel for applicants has relied upon following decisions :

- (a) M.A.Murthy Vs. State of Karnataka and others¹;
- (b) B.A.Linga Reddy and others Vs. Karnataka State Transport Authority and others²;
- (c) P.V.George and others Vs. State of Kerala & ors³.
- (d) Order dated 27th June 2022 passed by Hon'ble Supreme Court in Special Leave Petition (C) No.11039 of 2022 I the case of Manoj Parihar and others Vs. State of Jammu & Kashmir and others;
- (e) Indus Airways Pvt.Ltd and others Vs. Magum Aviation Pvt.Ltd and another⁴;
- (f) Order dated 1st December 2014 passed by this Court in Notice of Motion (L) No.2632 of 2014 in Suit No.1097 of 2014;
- (g) In Re : Expeditious Trial of Cases Under Section 138 of N.I.Act, 1881⁵;
- (h) Vijay Dhanuka etc Vs. Najima Mamtaj etc⁶;
- (i) Shivshankar Shrikrushna Dhole Vs. State of Maharashtra and others⁷;
- (j) The Order dated 7th June 2010 passed by this Court in the matter between Satish @ Rajendra s/o Harbans Tiwari and others Vs. State of Maharashtra and others⁸.

6. Learned advocate Mr.Yashpal Thakur appearing for respondents-complainant submitted that cheques were issued in discharge of liability. The grounds urged by the applicants are matter of defense and same cannot be urged at this stage. Whether there was enforceable liability or not is a question which will have to be

1 (2003)7-SCC-517

2 (2015)4-SCC-515

3 AIR-2007-SC-1034

4 (2014)12-SCC-539

5 Suo Motu Writ Petition (Cri) No.2 of 2020, decided on 16-4-2021

6 2014-ALL MR (Cri)-1924

7 2021-ALL MR (Cri)-3409

8 Criminal Writ Petition No.431 of 2009 of Nagpur Bench

decided during trial. Accused no.1 is company and others accused were Directors of accused no.1 company. Accused nos.2 and 3 were the signatories to cheques. Section 202 of Cr.PC has been complied in all the complaints. Even assuming that in some complaints it is not complied, the decision of Supreme Court in the case of In Re : Expeditious Trial of Cases Under Section 138 of N.I.Act, 1881 (supra), is prospective in nature and not retrospective. In the majority decisions of this Court prior to the aforesaid decision of Supreme Court, this Court has taken a view that compliance of Section 202 of Cr.PC for the complaint u/s.138 of N.I.Act is directory and not mandatory. The learned Sessions Judge has rejected the Revision Applications by assigning cogent reasons.

7. Mr.Thakur has relied upon following decisions :

- (a) Amit Kapoor Vs. Ramesh Chander and another⁹;
- (b) Helios and Matheson Information Technology Ltd and others Vs. Rajeev Sawhney and another¹⁰;
- (c) HMT Watches Ltd Vs. M.A.Abida and others¹¹;
- (d) Sampelly Satyanarayan Rao Vs. Indian Renewable Energy Development Agency Ltd¹²;
- (e) Rangappa Vs. Mohan¹³;
- (f) Laxmi Dychem Vs. State of Gujarat & ors¹⁴.
- (g) Rallis India Ltd Vs. Poduru Diaya Bhusan and ors¹⁵;
- (h) Shri Bansilal S. Kabra Vs. Global Trade Finance Ltd and another¹⁶;

9 (20129-SCC-460

10 AIR-2012-SC-660

11 (2015)11-SCC-776

12 AIR-2016-SC-4363

13 AIR-2010-sc-1898

14 (2012)13-SCC-375

15 (2011)12-SCC-88

16 Order of this Court in Cri.Application No.1344/2010, dated 9-7-2010

- (i) Vijay Tata Ravipati Vs. Mediascope Publicitas (India) Pvt.Ltd and another¹⁷;
- (j) Blackburn Metals Vs. Zep Engineering Works and others¹⁸;
- (k) Sunil Todi an others Vs. State of Gujarat and another¹⁹.
- (l) Subhiksha Trading Services td Vs. Kotak Mahindra Bank Ltd²⁰.

8. Learned Magistrate has relied upon averments in the complaint, documents on record, verification statement of complainant and issued process against accused. While issuing process learned Magistrate was pleased to observe that the Court has perused the complaint, verification statement of complainant, certificate to show the presentation of cheque within validity period, notice given within prescribed period, record of case, and that complainant satisfies the requisite ingredients. In the light of the observations made in the said order, process was issued against accused for offence u/s.138 r/w Section 141 of N.I.Act.

9. It is pertinent to note that cheques were issued by accused in discharge of liability. The contention of applicants is that cheques issued in respect to the settlement would not warrant prosecution under Section 138 of N.I.Act It is also contended that settlement agreement dated 30th October 2013 was the basis of issuance of cheques and settlement agreement would be effective only when Forward Market Commission approved the same and since Commission did not approve the said agreement, cheques cannot be

17 Order of this Court in Cri.Application No.1248/2016, dated 13-10-2017

18 Order of this Court in Cri.Applicaion No.1768/2019, dated 6-10-2021

19 (2021)-SCC OnLine-SC-1174

20 MANU/MH/1017/2010

said to have been issued for discharge of legally enforceable debt. The cheques were post dated. The cheques were issued by way of security. This defense of applicants cannot be appreciated at this stage. Whether cheques were issued in respect to enforceable liability, as contended by applicants, will have to be appreciated during trial.

10. In the case of Indus Airways Pvt.Ltd and others (supra), it was observed that existence of legally enforceable debt or other liability is an essential condition for constitution of offence u/s.138 of N.I.Act. The cheque issued for advance payment did not show any existing liability in failed transaction as agreed materials were not supplied. Hence, no liability u/s.138 of N.I.Act was made out. The decision is not applicable to the facts of present case. The factual matrix of said case would indicate that supplier received letter from the purchaser cancelling purchase orders and requesting the supplier to return both the cheques. The supplier sent response to the latter asking the purchaser as to when the supplier could collect the payment. The supplier sent notice to the purchasers and filed complaint u/s.138 of N.I.Act. Thus, it is apparent that purchaser's orders were cancelled and question of any liability in respect to the said orders did not arise.

11. In the case of Sunil Todi and others (supra), post dated cheque was issued with endorsement on its reverse "to be deposited after confirmation only for security purpose". On behalf of accused, it was contended that the cheque were intended at all material times to be security towards payment. Institution of complaint under Section 138 of N.I.Act is abuse of the process. The Supreme Court

distinguished the decision in Indus Airways Pvt.Ltd Vs. Magnum Aviation Pvt. Ltd. (supra) on the ground that advance payment was made, but since purchase agreement was cancelled, there was no occasion of incurring any debt. The Hon'ble Supreme Court had observed that object of Negotiable Instruments Act is to enhance acceptability of cheques and inculcate faith in the efficiency of negotiable instruments for transaction of business. The purpose of the provision would become otiose if the provision is interpreted to exclude cases where debt is incurred after the drawing of the cheque but before its encashment. The true purpose of Section 138 would not be fulfilled if 'debt or other liability' is interpreted to include only a debt that exists as on the date of drawing of cheque. Moreover, parliament has used the expression 'debt or other liability'. The expression 'or other liability' must have a meaning of its own, the Legislature having used two distinct phrases. The expression 'or other liability' has a content which is broader than debt and cannot be equated with latter. The explanation to Section 138 of the N.I.Act provides that 'debt or any other liability' means a legally enforceable debt or other liability. The proviso to Section 138 stipulates that the cheque must be presented to the bank within a period of six months from the date on which it is drawn or within its period of validity. The term debt also includes a sum of money promised to be paid on future day by reason of a present obligation. A post dated cheque issued after the debt has been incurred would be covered by definition of 'debt'. If the sum payable depends on a contingent event, then it takes the colour of a debt only after contingency has occurred.

12. In HMT Watches Limited Vs. M.A.Abida and others (supra), it was argued on behalf of respondents (accused) that since the

cheques were given as security, as such there was no liability to make the payment and the ingredients of the offence punishable under Section 138 of N.I.Act were not made out. The Court observed that the accused challenged the proceedings, taking factual defenses. Whether the cheques were given as security or not or whether there was outstanding liability or not, is a question of fact which could have been determined only by the Trial Court after recording evidence of the parties. The High Court has erred in law in going in to the factual aspects of the matter which were not admitted between the parties. In the case of Sampelly Satyanarayan Rao Vs. Indian Renewable Energy Ltd. (supra), the question for consideration was whether the dishonour of a post dated cheque given for repayment of loan installment which is also described as 'security' in the loan agreement is covered by Section 138 of N.I.Act. It was observed that the question whether a post dated cheque is for discharge of debt or liability depends on the nature of the transaction. If on the date of the cheque, liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.

13. It is not possible to conduct a roving inquiry at the time of issuing process. The alleged liability of the applicants was to the tune Rs.922 crores. Settlement agreement was executed on 30th October 2013 between applicants and its sister concern with complainant. As per said settlement agreement it was mutually decided and agreed between the parties that Mohan Group has agreed for settlement for Rs.771 cores as full and final settlement amount towards obligations of Mohan Group against National Spot Exchange Limited. Though it has been contended by applicants that

due to non approval by Forward Market Commission and subsequent cheques issued under settlement agreement is without any enforceable debt and liability, according to respondent, the said contention raised by applicants was dealt with by this Court in Notice of Motion (L) No. 2632 of 2014 in Suit No.1097 of 2014. This Court in order dated 1st December 2014 had observed that though settlement agreement dated 30th November 2013 cannot be implemented, admission of liability made by applicants therein can always be enforced. Vide order dated 1st November 2018 passed by this Court in Notice of Motion 26 of 2015 filed in Commercial Suit No.85 of 2015, this Court had observed that settlement agreement dated 30th October 2013 made and executed between the parties was arrived at u/s.73 of Arbitration and Conciliation Act, 1996. The same was duly signed by respective parties and authenticated by conciliator and agreement has an effect of arbitral award. This Court had observed that complainant was permitted for execution of said agreement as an arbitral award. The contention of applicants is that cheques are not issued against any enforceable debt and liability cannot be accepted at this stage. Existence of debt and liability is required to be adjudicated before Trial Court and approved by parties on the basis of evidence. Whether there was any outstanding liability is a question of fact which will have to be determined at the time of trial on the basis of evidence.

14. In the case of Amit Kapoor Vs. Ramesh Chander and another (supra), the Supreme Court discussed ambit and scope of Section 397 and Section 482 of the Code. It is observed that inherent and revisional jurisdiction should be exercised cautiously. Though there are no limits on the powers of the Court under Section 482 of the

Code, but more the power, more due care and caution is to be exercised in invoking these powers. If the allegations are patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied, then the Court may interfere. No meticulous examination of evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge. In the case of Helios and Matheson Information Technology Ltd and others Vs. Rajeev Sawhney and another (supra), it was held that if complaint contains assertions with sufficient amount of clarity on facts and events which if taken as provided, can culminate in order of conviction against accused persons, then it is precisely the test to be applied while determining whether Court taking cognizance and issuing process was justified in doing so. In Laxmi Dyechem Vs. State of Gujarat and others (supra), the question whether or not there was a lawfully recoverable debt or liability for discharge would be a matter that Trial Court will examine keeping in view the statutory presumption that unless rebutted the cheque is presumed to have been issued for a valid consideration. In Rangappa Vs. Sri Mohan (supra), it was held that once issuance of a cheque and signature thereon are admitted, presumption of a legally enforceable debt in favour of the holder of the cheque arises. In Rallis India Ltd Vs. Poduru Bhushan and others (supra), the High Courts were cautioned while exercising powers under Section 482 of Cr.P.C whenever case relates to disputed question of facts.

15. The other contention urged by the applicants herein is that the accused being residents outside the jurisdiction of Trial Court, it was mandatory for the Court to hold an inquiry u/s.202 of Cr.P.C.

Whereas, learned counsel for respondent has contended that mandate of Section 202 of Cr.PC has been complied in the present case and even assuming that inquiry as contemplated u/s.202 of Cr.PC is not conducted, the decision in the case of In Re : Expeditious Trial of Cases Under Section 138 of N.I.Act, 1881 (supra), is prospective. The complaint in the present cases were filed prior to the said decision and process was issued prior to the said decision.

16. Learned counsel Mr.Setalvad has strongly contended that the inquiry under Section 202 is mandatory and the principle of prospective overruling is not applicable to the decision in the case of Re : Expeditious trial of cases (supra). Learned counsel has relied upon aforesaid decisions.

17. 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 another²¹, and Birla Corporation Limited Vs. Advent2 Instruments and Holdings Limited and others²². 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

21 (2017)3-SCC-528

22 (2019)16-SCC-610

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 another²³, 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*

23 (2016)11-SCC-105

examination of witnesses.

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.

6) Judgments of this Court in Adalat Prasad (supra) and Subramaniam 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.

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.”

18. The aforesaid decision was delivered on 16th April 2021. The complaints which are subject matter of applications before this

Court, were filed in 2014 and 2015. Process was issued in 2014, 2015 and 2016.

19. 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.PC. The circular also indicate that directions are prospective.

20. 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 any 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.

21. Mr.Setalvad had relied on decision of this Court in Shivshankar Shrikrishna Dhole Vs. State of Maharashtra (supra). This Court

relied upon the decision of Supreme Court in the case of Re : Expeditious trial of cases under Section 138 of NI.Act (supra) and observed that the said decision confirms the view of this Court in the case of Satish @ Rajendra Harbans Tiwari and others Vs. State of Maharashtra²⁴, wherein this Court held that when the Magistrate issued process only upon perusing the complaint and verification statement on oath by the complainant, it is not sufficient compliance of Section 202 of Cr.PC. Section 202 of Cr.PC mandates that when the accused is resident of a place outside the jurisdiction of the concerned Magistrate, an inquiry under the said provision has to be undertaken. However, the Court did not consider the issue whether the aforesaid decision of Supreme Court is prospective or retrospective as such issue was not raised before the Court. The decision in the case of Satish @ Rajendra Tiwari (supra) was delivered on 7th June 2010. The complaint was related to offence under Section 498A IPC and process was issued for the said offence. The accused was residing beyond jurisdiction of the Court. It was contended at the instance of accused that inquiry under Section 202 of the Code was not conducted. The learned advocate for complainant had submitted that the averments made in the complaint and the verification statement of the complainant recorded on oath is nothing but an inquiry by the Magistrate and therefore it cannot be said that there was no inquiry made by the Court. In this context, it was observed that by merely going through the averments in the complaint and verification statement it cannot be said that the Magistrate had held inquiry as contemplated by amended provision of Section 202 of the Code.

24 2010-Cr.L.J.-4089

22. Mr.Setalvad had relied upon certain decisions in support of his submission that the decision of Supreme Court in Re : Expeditious trial of cases (supra) is not prospective and also on principle of prospective overruling. In the case of M.A.Murthy Vs State of Karnataka and others (supra), the appellant and respondent nos.4 and 5 therein were applicants in response to the advertisement. Respondent no.4 was not qualified on the last date of submission of application. He was permitted to attend and appear for written test. On the date of interview, he was eligible. Similar was situation of respondent no.5. Respondent no.4 was selected and respondent no.5 was kept in waiting list. The appellant challenged the selection and listing of respondent no.5 in waiting list. The Single Judge of the High Court held that respondent no.4 was ineligible as on the date of employment, but in public interest the selection was maintained. Reference was made to the decision of Supreme Court in Ashok Kumar Vs. Chander Shekhar²⁵, where it was held that if the applicant had acquired qualification by the time of interview that is sufficient. The view in Ashok Kumar Sharma's case was later overruled in Ashok Kumar Sharma Vs. Chander Shekhar II²⁶. Hence, review application was filed in the case. The High Court held that on the date of selection the first judgment held the field and selection of respondent no.4 cannot be questioned. In these circumstances it was submitted before the Court that doctrine of prospective overruling is an exception to the normal principle of law. The Supreme Court in this context had observed that prospective overruling is a part of the principles of constitutional canon of interpretation and can be resorted by Supreme Court while superseding the law declared by it earlier. It is a device innovated to avoid reopening of settled issues,

25 1993-Supp (2)-SCC-611

26 (1997)4-SCC-19

to prevent multiplicity of proceedings and to avoid uncertainty and avoidable litigation. Actions taken contrary to the law declared prior to date of declaration are validated in larger public interest. It is for the Court to indicate as to whether the decision in question will operate prospectively. There shall be no prospective overruling, unless it is so indicated in the particular decision. The High Court in the said case was in error by holding that the judgment which operated on the date of selection was operative and not the judgment in review especially when the earlier decision having been erased by review. This decision is not applicable in the present case. The Supreme Court was considering the measures for expeditious disposal of cases. No decision was set aside or overruled. In fact, the tenor and directions in the decision indicate it to be prospective. In the case of P.V.George Vs. State of Kerala (supra), it is held that law declared by a Court will have a retrospective effect if not declared so specifically. In B.A.Linga Reddy and others Vs. Karnataka State Transport Authority and others (supra), and the decision in the case of Manoj Parihar Vs. State of Jammu and Kashmir (supra), the Supreme Court reiterated the same view. It is pertinent to note that the Supreme Court in the case of Re : Expeditious trial (supra), was concerned with pendency of large number of cases under Section 138 of N.I.Act and adopting remedial measures for speedy disposal of complaints and not to revert back the proceedings wherein inquiry under Section 202 of the Code is not conducted.

23. 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 Bansilal Kabra Vs. Global Trade Finance Ltd and another (supra), 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.

24. 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.PC 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.PC in consonance with Section 138 of N.I.Act is directory. In the case of Blackburn Metals (supra), this Court has once again considered the issue relating to compliance of Section 202 of Cr.PC 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.

25. 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 that 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 no 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.”

26. 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.PC 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.PC, 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.PC 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 Tunda²⁷, and Re : Expeditious Trial of cases under Section 138 of N.I.Act. It would be relevant to quote observations in

²⁷ (2015)12-SCC-420

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 Mamta (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]. ”*

27. Apart from aforesaid aspects, learned counsel for respondent-complainant has pointed out several orders passed in several complaints which are under challenge in this Court which are in the present proceedings and pointed out that inquiry u/s.202 of Cr.PC was conducted by learned Magistrate.

28. The grounds relating to post dated cheques and non existence of enforceable debt/liability cannot be considered at this stage. Considering the aforesaid circumstances, I do not find any infirmity in the order issuing process passed by learned Magistrate in the complaints which are under challenge before this Court. Apart from the fact that decision in the case of Re : Expeditious trial of cases under Section 138 of N.I.Act is prospective, the order issuing processes are in consonance with principle enunciated in decision of

Hon'ble Supreme Court in the case of Sunil Todi and others Vs. State of Gujarat (supra).

ORDER

- (i) Criminal Application Nos.194, 195, 192, 193, 196, 203, 221, 214, 225, 224, 222 and 213 of 2022 stand rejected;
- (ii) Trial is expedited.

(PRAKASH D. NAIK, J.)

MST