

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL WRIT PETITION NO. 456 OF 2022

1. M/S. Bungee Fashion Private Ltd.
2. Aditya Jalan, Aged about 24 years,
Occ.:Business.
3. Mrs. Aditi w/o Aditya Jalan, Aged about
23 years, Occ. : Business.

All having address at R/o 27, Land Send
Dongersey Road, Malabar Hills,
Walkeshwar, Mumbai.

... PETITIONERS.

VERSUS

Praful s/o Gopaldas Agarwal, Aged
about 36 years, Occ. Business, R/o
Shankar Bhawan, Main Road,
Gondia Tahsil & District Gondia.

... RESPONDENT.

Ms. Chaula Solanki a/w Shri PD. Sharma, Advocate for the
petitioners.

Shri R.H. Agrawal, Advocate for the respondent.

CORAM : **VINAY JOSHI, J.**

JUDGMENT RESERVED ON : **07.10.2022.**

JUDGMENT PRONOUNCED ON : **09.11.2022.**

JUDGMENT :

RULE. Rule made returnable forthwith. Heard finally by consent of learned Counsel appearing for the parties.

2. The challenge in this petition is to the order of issuance of process dated 11.08.2017 and consequential order passed by the Revisional Court dated 24.01.2022 whereby the Court has declined to interfere into the order of the Magistrate dated 13.08.2019 by which the application for discharge has been rejected. Though multiple orders are under challenge, the grievance is about issuance of process in terms of Section 204 of the Code of Criminal Procedure (for short hereinafter referred to as 'the Code') relating to offence punishable under Section 138 of the Negotiable Instruments Act (for short 'the N.I. Act').

3. The petitioner who is an accused of Criminal Case No. 1075/SS/2017 has raised a challenge on the ground that the petitioners (accused) resides outside the territorial jurisdiction of the concerned Magistrate and therefore, in view of the amendment to Section 202 of the Code, the order of issuance of process without complying mandatory requirement of inquiry is unsustainable in the

eyes of law.

4. The respondent has filed Criminal Complaint for the offence punishable under Section 138 read with Section 142 of the N.I. Act on account of dishonor of cheque tuning Rs.25 lakhs. The learned Magistrate after considered the relevant material by recording his personal satisfaction has issued process vide order dated 11.08.2017. The petitioner has filed an application at Exhibit 25 seeking discharge contending that the essential inquiry in terms of Section 202 of the Code has not been conducted. Learned Magistrate has rejected said application on which the petitioners have filed criminal revision challenging the order of rejection of discharge. Before the Revisional Court, petitioners took the same stand that the mandatory inquiry in terms of Section 202 of the Code has not been carried, and therefore, the proceeding vitiates. The Revisional Court has observed that though the inquiry under Section 202 of the Code is mandatory, the learned Magistrate himself has conducted an inquiry on the basis of affidavit, documents and therefore the order of issuance of process is well sustainable in the eyes of law.

5. The limited controversy arose in this petition is about the

statutory compliance of Section 202 of the Code. It is not in dispute that the Criminal Complaint has been filed in the Court of Judicial Magistrate First Class, Gondia whilst the petitioners (accused) are resident of Mumbai. It is the petitioners' prime contention that in view of law laid down by the Supreme Court in case of ***Sunil Todi and others vs. State of Gujarat and anr. 2021 SCC OnLine SC 1174*** inquiry under Section 202 of the Code is mandatory one. Moreover, it is submitted that the affidavit though filed by the respondent (complainant), it does not amount to an inquiry contemplated under Section 202 of the Code.

6. Having regard to the divergent opinions regarding requirement of inquiry under Section 202 of the Code, the Supreme Court in ***Suo Motu Writ Petition (CRL.) No. 2 of 2020 and in case of Sunil Todi (supra)*** has clarified that inquiry as per amended Section 202 of the Code is mandatory when the accused resides outside the jurisdiction of the Court. Moreover, it is ruled that, for inquiry under Section 202 of the Code, evidence of witnesses shall be permitted to be taken on affidavit. In suitable cases, the inquiry can be restricted to examination of documents without examination of witnesses.

7. The question arose for consideration is whether in given

facts the Magistrate has complied the necessary requirement. No doubt, the order of issuance of process dated 11.08.2017 does not disclose whether the complainant has filed an affidavit at the time of issuance of process. The order of issuance of process indicates that the Magistrate has gone through the documents and formed opinion about making out *prima facie* case to proceed further. The order of the Revisional Court bears a specific reference in paragraph 15 that the complainant has filed his affidavit on 11.08.2017 and thus, mandatory inquiry has been complied with. True, the order of issuance of process does not bear the reference of affidavit, however undeniably the affidavit was filed prior to the passing of the order of issuance of process. The copy of affidavit has been produced on the record. The learned Counsel for petitioners also challenged the tenability of the affidavit sworn before the notary public. For this purpose petitioners took me through Section 6 of the Oaths Act, 1969 to contend that the affidavit must have been sworn before the judicial authority. However, Section 6 of the Oaths Act only speaks about forms of oaths and affirmation. Section 297(1)(c) of the Code authorizes a notary before whom the affidavit can be sworn. Thus, there is no legal impediment in filing affidavit which is sworn before the notary public.

8. Learned Counsel appearing for the petitioners would submit that on the date of filing of criminal complaint, it was not accompanied by the affidavit, however it was subsequently filed on 10.08.2017 and therefore, the complaint is not tenable. In other words, he would submit that the Magistrate was not empowered to take cognizance of the complaint in absence of affidavit. It reveals from the Roznama that the criminal complaint was filed on 08.06.2017 on which it was postponed on 11.08.2017 for verification. The record indicates that prior to 11.08.2017 i.e. on 10.08.2017 itself affidavit was filed by the complainant on which the Magistrate has issued the process.

9. Section 202 of the Code nowhere puts restriction on the Court of taking cognizance without holding an inquiry. The amendment to Section 202 only convey that if accused resides outside the jurisdiction of Magistrate, it is incumbent on the Magistrate to hold inquiry either himself or through Police. Thus, the restriction is on issuance of process under Section 204 and not on taking of cognizance. The Supreme Court in above referred case ***Suo Moto Criminal Petition (CRL.) No. 2 of 2020*** has clarified that during inquiry under Section 202 of the Code evidence of witnesses can be taken on affidavit in terms of Section 145 of the N.I. Act. Thus, there is no requirement to

hold separate inquiry nor the Code provides as to in which manner the inquiry has to be conducted. The only requirement of amended Section 202 of the Code is that when the accused is residing at a place beyond the jurisdiction of the Magistrate, either he shall inquire into the case himself or direct an investigation to be made by the Police Officer. As noted above, filing of affidavit under Section 145 of the N.I. Act can be treated as an evidence and therefore, perusal of affidavit along with documents amounts to holding an inquiry for the purposes to find out whether a case is made out for issuance of process.

10. The learned Counsel for the petitioner by relying on the decision of this Court in ***Criminal Application (APL) No.27 of 2022 (K & K Foundry Pvt. Ltd. Thr. Its. Managing Director and Ors. vs. State of Maharashtra & Anr.)*** dated 10.03.2022, would submit that the order of issuance of process does not indicate reasons for passing an order of issuance of process and therefore, it is not tenable. Learned Counsel for the petitioner also relied on the decision of this Court in case of ***Rainbow Papers Limited and ors. vs. State of Maharashtra 2021 ALL MR (Cri) 3527***. In said case the impugned order does not reflect that mandatory inquiry was conducted and therefore, on the basis of given facts the order of issuance of process was set aside. Being distinct facts,

the said decision is of no assistance.

11. It is totally a factual aspect to see whether the Magistrate has followed the mandate of conducting inquiry. Though the reasons are required for issuance of process however at this stage it is expected to record the reasons in brief to satisfy about the sufficiency of material to proceed further. Elaborate reasoning is not necessary but order of issuance of process must reflect due application of mind. The impugned order indicates that the Magistrate has perused the copy of cheque, cheque return memo, notice, postal acknowledgment and other documents. Though in specific words there is no reference about perusal of affidavit, however on the date of passing order affidavit was on record. Rather the affidavit coupled with documents has persuaded Magistrate to form an opinion about sufficiency of material and therefore, merely because the word 'affidavit' has not been used in the order, it does not vitiates the same.

12. Having regard to all above facts, it is apparent that the Magistrate has complied the mandatory requirement of Section 202 of the Code of holding inquiry and the impugned orders reflect due application of mind therefore, the challenge raised in this petition is

untenable. The Writ Petition being devoid of merits, stands dismissed.

No order as to costs.

(VINAY JOSHI, J.)

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