

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

CRIMINAL APPLICATION (APL) NO. 1167 OF 2022

M/s. Niwas Spinning Mills Ltd & Ors.

.VS.

Shree Varu Traders

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions Court's or Judge's orders.
and Registrar's Orders.

Shri H. M. Mohta, Advocate for the applicants

Shri N. S. Badhe, Advocate for the non-applicant

CORAM : G.A. SANAP, J.

DATE : NOVEMBER 29, 2022.

By this application, the applicants have questioned the correctness and legality of the order dated 17.12.2021, passed by the learned Judicial Magistrate First Class Amravati, whereby the learned Magistrate, on the complaint of the non-applicant/complainant, was pleased to take the cognizance of an offence under Section 138 of the Negotiable Instrument Act, 1881 (For short 'N. I. Act') and issued the process against the applicants/accused.

2. The grounds of challenge to the impugned order have been set out in the application. The basic contention of the applicants/accused is that the inquiry contemplated under Section 202 of the Code of Criminal Procedure (For short 'Cr.P.C.') was not conducted by the Magistrate. The amount mentioned in the notice, issued prior to filing of the

complaint, is lesser than the amount of a cheque. The order does not reflect the reasons to indicate the application of mind to the material placed on record.

3. I have heard the Advocates for the parties. Perused the record and proceedings.

4. Learned Advocate for the applicants have relied upon the decision in the case of ***Dashrathbhai Trikambhai Patel .v/s. Hitesh Mahendrabhai Patel and Anr.***, reported in, ***2022 DGLS (SC) 1340***, and submitted that the complaint itself was not maintainable inasmuch as the amount stated in the notice was lesser than the amount of cheque. Learned Advocate further submitted that the order of Magistrate issuing process without considering this material aspect is illegal. Learned Advocate relying upon the decision of the Constitutional Bench of Hon'ble Supreme Court in Re-Expeditious Trial of Cases under Section 138 of N. I. Act, 1881 ***Suo Motu Writ Petition (Criminal) No. 2 of 2020***, reported in, ***2021 ALL MR (Cr.) 2641 (S.C.)***, submitted that the accused are the resident of District Kolhapur whereas the complainant is resident of Amravati and the complaint is filed in the Court of Judicial Magistrate First Class at Amravati. Learned Magistrate, in view of the mandate of Section 202 of the Cr.P.C., was duty bound to postpone the issuance of process and conduct the inquiry either by himself or through

police before issuing the process. Learned Advocate submitted that the inquiry, as contemplated under Section 202 of the Cr.P.C., was not conducted and therefore, the cognizance taken and the process issued is not according to law. Learned Advocate, therefore, submitted that the order passed by the learned Magistrate for issuance of process deserves to be quashed and set aside.

5. Learned Advocate appearing for the non-applicant/complainant relied upon the decision in the case of ***Sunil Todi and ors. .v/s. State of Gujrat and Anr.***, reported in, ***2021 CJ(SC) 644*** and submitted that in this case the Hon'ble Supreme Court has considered the decision in Suo Moto Petition No. 2 of 2020, dated 16.04.2021 and has followed the same and ultimately held that the evidence of the complainant in a proceeding under Section 138 of the N. I. Act can be taken on affidavit. Learned Advocate further submitted that in this case it is held that even without examining the witness in a suitable case the Magistrate can examine documents to be satisfied that there are sufficient grounds for proceedings under Section 202 of the Cr.P.C.

6. In order to appreciate the rival submissions I have gone through the available record and proceedings. Certain facts relevant for decision of this application needs to be stated at the outset. The notice before filing the complaint was issued

on 02.11.2022. It is true that the amount of Cheque was 15,24,569/-. However, by this notice the complainant made a demand of Rs.11,24,569/- only. It was specifically stated in the complaint that the accused persons on 03.11.2017 paid Rs.4,00,000/- to the complainant. It is, therefore, seen that the amount claimed by notice is not more than the amount mentioned in the cheque. The amount demanded by the notice is lesser than the amount of cheque. The complainant has categorically stated that since the amount of Rs.4,00,000/- was paid on 03.11.2017, the demand of Rs.11,24,569/- was made. The accused/applicants, on 02.12.2021, replied the said notice. In para 8 of the reply, the accused/applicants have stated that on 03.11.2017 they paid Rs.4,00,000/- to the complainant. It is seen on perusal of this reply that there was no grievance, as such, made by the accused persons about the payment of Rs.4,00,000/-.

7. It is further seen on perusal of record that the learned Magistrate on presentation of complaint taken the affidavit of evidence of the complainant on record. The learned Magistrate made an endorsement on the affidavit to the effect "Witness present and admitted contents of affidavit. Read and recorded." This exercise was undertaken on 17.12.2021. The copy of the complaint is placed on record. The complainant relied upon the complaint, the cheque issued by the accused, the document with regard to the intimation of

dishonor of cheque from the bank, the notice issued to the accused persons and the reply received from the accused persons. Perusal of the affidavit would show that all these facts have been elaborately stated in the affidavit. *Prima facie* perusal of this material would indicate that the learned Magistrate, before taking the cognizance and issuing the process, had conducted inquiry as contemplated under Section 202 of the Cr.P.C. In the light of the law laid down by the Hon'ble Supreme Court in the case of *Suo Motto* Petition No.2 of 2020, this exercise cannot be said to be illegal. Para 12 of this judgment of the Constitutional Bench has considered this aspect. Para 12 reads thus:

“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 or other proceeding, 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.”

8. This judgment of the Constitutional Bench was considered in the case of *Sunil Todi (supra)*. Para 38 of this judgment would be relevant for addressing the issue. Para No. 38 reads thus:

“38. 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 Cr.P.C. 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) Cr.P.C. 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.”

9. It is therefore seen that the stamp of illegality sought to be put on the order passed by the Magistrate is not at all acceptable. The law laid down in these two decisions does not permit me to accept the submissions advanced by the learned Advocate for the accused persons.

10. As far as the decision in the case of *Dashrathbhai Patel .v/s. Hitesh Patel and Anr. (Supra)* is concerned the same would not be applicable to the facts of this case. In the case before the Hon’ble Supreme Court the amount mentioned in the notice was more than the amount of a cheque. The Hon’ble Supreme Court has observed that if in a notice while giving the break-up of the claim, the cheque

amount, interest, damages etc. are separately specified, other such claims for interest, cost etc would be superfluous and these additional claims would be severable and will not invalidate the notice. It is further held that if, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, the notice might well fail to meet the legal requirement and may be regarded as bad. Coming back to the case on hand it is undisputed by the accused persons that before issuance of notice the accused persons paid Rs.4,00,000/- to the complainant. The complainant in the notice has explained all these facts and therefore, though the cheque is for Rs.15,24,569/-, made the demand of Rs.11,24,569/- after deducting Rs.4,00,000/- already paid by the accused persons. In the fact situation it cannot be said that amount of Rs.11,24,569/- could not be said to be the amount of the cheque.

11. In view of the above, I am of the view that there is no substance in the application. Learned Magistrate has taken all the facts into consideration. The procedure followed by the learned Magistrate is in accordance with law and there is no substance in the application. The application, therefore, stands **dismissed**.

(G. A. SANAP, J.)