

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.206 OF 2023

1. Dipak S/o. Purushottam Patil, **...PETITIONERS**
Age-62 years, Occu-Chairman
2. Ashok Supdu Patil,
Age-61 years, Occu-Managing Director
3. Premsing Himmatsing Aaher,
Age-61 years, Occu-Vice-Chairman
4. Kashinath Bhikkan Patil,
Age-61 years, Occu-Distillery Manager
5. Punamchand Hiranman Mistari,
Age-52 years, Occu-Service,
6. Chotulal Girdhar Patil,
Age-61 years, Occu-Secretary,

All C/o. Shri Satpuda Tapi Parisar Sahakari
Karkhana Ltd. Purushottamnagar,
Shahada, Tq. Shahada, Dist. Nandurbar

VERSUS

M/s. Sudhanshu Enterprises, **...RESPONDENT**
Pro. Saroj Dharmendra Sharma
POA Holder, Dharmendra Gorakshanath Sharma
Age-54 years, Occu-Business,
R/o. Thatte Ground Shrirampur,
Dist. Ahmednagar

**AND
CRIMINAL WRIT PETITION NO.1792 OF 2019**

Mahesh Mangesh Kulkarni,
Age-36 years, Occu-Business,
R/o. Plot No. 23, Padekar Nagr,
B/H Jaibhawani Petrol Pump,
Dindoori, Nashik

...PETITIONER

VERSUS

Shankeshwar Agency
Through Its Prop. Atul Champalal Lodha
Age-33 years, Occu-Business,
R/o. Opp. Market Yard, Sawangi,
Lasur Station, Sawangi, Tq. Gangapur,
Dist. Aurangabad

...RESPONDENT

Mr. V. D.Hon, Senior Advocate i/b Mr. Abasaheb D. Shinde,
Advocate for the petitioner in WP/206/2023
Mr. Gaurav L. Deshpande, Advocate for the petitioner in
WP/1792/2019
Mr. V. D. Sapkal, Senior Advocate i/b Mr. S. R. Sapkal, Advocate
for the respondent in WP/206/2023
Mr. Sagar S. Ladda, Advocate for the respondent in
WP/1792/2019
Mr. P. N. Kutti, APP for the respondents/State

CORAM : KISHORE C. SANT, J.

RESERVED ON : 02nd MAY, 2023

PRONOUNCED ON : 16th JUNE, 2023

JUDGMENT

1. Rule.

2. Rule made returnable forthwith. With the consent of

the parties the petitions are taken up for final hearing.

3. These petitions are by the original accused persons in complaint bearing SCC No.1600/2022 pending before the learned JMFC, Shrirampur. The petitioners have challenged the order dated 31-01-2023 passed by the learned Additional Sessions Judge, Shrirampur dismissing the Criminal Revision Application bearing No.2/2023. By way of impugned judgment and order the learned Sessions Judge has confirmed the order passed by the learned JMFC, Shrirampur dated 23-12-2022 wherein the process against the petitioners for the offences punishable under Sections 138 of the Negotiable Instruments Act is issued.

4. Facts, in short, are as under:-

5. The petitioners are Directors of one Shri Satpuda Tapi Parishar Co-operative Sugar Factory. In writ petition No.206/2023 the petitioner No.1 is the Chairman, petitioner

No.2 is Managing Director, petitioner No.3 is the Vice-Chairman, petitioner No. 4 is the Distillery Manager, petitioner No.5 is authorized person and petitioner No.6 is the Secretary of the said Sugar Factory.

6. It is alleged that respondent No.2 entered into an agreement with the sugar factory for supply of denatured spirit. Towards agreement he paid amount of Rs. 1 crore to the sugar factory. Pursuant to an agreement an order was placed with the sugar factory. However factory could not supply denatured spirit. The matter was thereafter settled between the parties in commercial suit and towards that the factory gave cheque for an amount of Rs.1 crore to the respondent vide cheque No.103955. The cheque was signed by petitioner Nos.3 and 4. As per the agreement in case of failure to transfer the amount through RTGS prior to 31-08-2022 the cheque was to be presented in the bank.

7. Pursuant to the said agreement since no amount was

transferred till 31-08-2022 as per the settlement in Permanent Lok-Adalat in proceeding No.1/22 the cheque was presented in the bank on 01-09-2022. However, said cheque was returned with an endorsement 'funds insufficient'. Respondent therefore sent the notice of demand dated 12-09-2022. It is alleged that in spite of receipt of notice no amount was paid. Therefore, the complaint came to be lodged.

8. Learned JMFC after perusing the complaint and recording the verification statement-cum-affidavit of the complainant under Section 200 of the Code of Criminal Procedure and after hearing the advocate was pleased to pass the order issuing the process against the accused Nos.2 to 7 i.e. present petitioner Nos. 1 to 6.

9. The petitioners challenged this order of issuance of process by filing the criminal revision application No.2/2023 in the court of learned Additional Sessions Judge, Shrirampur on the grounds that the order passed by the learned JMFC,

Shrirampur is without application of mind. The cheque was issued for the purpose of security. There is no sufficient averments to show the petitioners are vicariously liable as per section 141 (1) of the N. I. Act. The learned revisional court considered that all the requirements for filing the complaint under Section 138 are fulfilled. So far as the vicarious liability is concerned the court has considered that averments in the complaint are sufficient wherein the complainant has given details about the liability of the accused persons. So far as the submission in respect of compromise in commercial Case No. 1/2022 is concerned the court considered that cheque came to be presented on 01-09-2022 since the amount as agreed in commercial case No.1/2022 was not paid till 31-08-2022. Submission is also turned down that the cheque was only given towards the security. The learned Sessions Court considering the judgment in the case of Pooja Ravindra Devidasani Vs State of Maharashtra reported in LAW (SC) 2014 12 55, Blackburn Metals Vs M/s. Zep Engineering Works and others in Criminal Application (APL) bearing No. 1768/2019 dated 06-10-2021

from this court at Bombay, National Small Industries Corporation Ltd. Vs Harmeet Singh Paintal and another reported in LAWS (SC) 2010 2 66. The Court ultimately held that the process was rightly issued and rejected the revision. Against this order the present petitioners have approached this court.

10. In writ petition No.1792/2019 facts are that the respondent filed the complaint under Section 138 of the N. I. Act. In the court at Aurangabad. Learned JMFC, Aurangabad issued process by order dated 21-11-2018. The petitioner filed revision application No.18/2019. His revision application came to be rejected by the order dated 14-08-2019 and thus the petitioner is before this court.

11. The learned Senior Counsel Mr. Hon submits that all the accused persons are residents of place beyond the territorial jurisdiction of the learned JMFC, Shrirampur. In view of this the learned Magistrate ought to have conducted an enquiry under Section 202 of the Cr. P.C.. He submits that an enquiry under

Section 202 cannot be dispensed with. From the order it is seen that there is no reference to the enquiry under Section 202. The revisional court has failed to consider this vital aspect and has committed illegality by rejecting the revision application when there was specific ground taken by the petitioners in respect of section 202 of Cr. P. C. therefore, the orders suffers from non application of mind.

12. He submits that enquiry under Section 202 is not the matter of interference and court has to show specific compliance with the said provision.

13. Mr. Gaurav Deshpande, learned advocate for the petitioner in petition No.1792/2019 adopts the argument of Mr. Hon, learned senior counsel so far as the submission as regards enquiry under Section 202 is concerned.

14. In addition to that he submits that in his case one more fact needs to be considered is the date of dishonor dated

30-07-2018. Whereas notice is given on 29-08-2018. Notice is thus given beyond 30 days and therefore no cause of action arises in this case. He points out the copy of complaint Exh.A. His further submission is that cheque bears name as M. K. Enterprises as account holder. However notice is sent only to Mahesh Kulkarni. There is no whisper about M. K. Enterprises in the entire notice or in the title clause. As stated the notice is sent after 31 days and not on 30 days. Address of the complainant is also shown of Gangapur. However, complaint is filed at Aurangabad.

15. The learned Senior counsel Mr. Sapkal for the respondent submits that ultimate object of conducting enquiry under Section 202 is to see that the Magistrate is satisfied about genuineness of the complaint. In this case looking to the order passed by the learned Magistrate it is clearly seen that the learned Magistrate was satisfied about the genuineness of the complaint. The court has considered the affidavit that was filed by the complainant in view of section 145 of the N. I. Act which

is considered to be an evidence. Thus, the affidavit filed towards the evidence can certainly be considered for the purpose of enquiry. He submits that the court has also examined the documents and thus this exercise was sufficiently accepted. It is seen that the court certainly satisfied itself about complaint. From the complaint he submits that role of each of the petitioners is shown. He submits that it is admitted fact that a commercial suit No.1/2022 was filed by the respondent. In the said suit there was a compromise and pursuant to the said compromise cheque was issued. He submits that by looking to the evidence affidavit it is seen that all the ingredients are present for filing complaint under Section 138. He alternatively submits that said enquiry itself considered to be an enquiry under Section 202.

16. This court in view of the facts and submissions has to see the main argument revolves around compliance of section 202. Question therefore falls for consideration is as to whether enquiry under Section 202 is necessary when the accused

persons are residing beyond territorial jurisdiction of the court issuing process. Secondly, in the facts of this case as submitted by the advocate for the respondent that when the court is satisfied on the basis of affidavit of evidence and documentary evidence on record and is sufficient exercise to show that the learned Magistrate has conducted an enquiry. The parties have relied upon the various judgments. Both the parties have placed reliance on the judgment reported in 2021 SC 1957 in the case of *Suo Motu Writ Petition (Cri) No. 2/2020* that is regarding expeditious trial of the cases under Section 138 of the N. I. Act. The petitioner also relied upon the judgment reported in 2022 (5) MhLJ (Cri) 72 in the case of *Kisanrao Gadekar (Dr.) Vs Changdeo Khanderao Pyatangare and another and another*. Next judgment reported in 2023 (1) MhLJ 238 in the case of *Sayed Mohammed Omair Sayed Ibrahim and Others Vs State of Maharashtra*. Reliance is also placed on the judgments passed by this court in Criminal Application No. 3194/2022 in the case of *Ismail Suleman Shaikh Vs Hanif Rafique Sayyad* dated 22-02-2023.

17. Learned advocate for the respondent relied upon the judgment reported in 2021 SCC Online SC 1174 in the case of Sunil Todi and others Vs State of Gujrat and another. The submission of the respondent that in the case of Sunil Todi the Hon'ble Apex Court by considering the judgment in suo moto writ petition No. 02/2022 has held that enquiry under Section 202 need not be specifically held and submits in his case the enquiry already conducted. On this submission this court has to consider all the judgments in the light of the submission made by both the parties.

18. In the case of expeditious trial the Hon'ble Apex Court has held that enquiry under Section 202 of the Code in 138 case is must. The court considered section 202 of the Code of Criminal Procedure in relation to section 145 of the N. I. Act to hold that it is mandatory for the learned Magistrate to conduct an enquiry before issue of process in a case where the accused resides beyond the area of territorial jurisdiction of the

court. The Hon'ble court noted that there has been divergent opinions amongst the High Court relating to the applicability of section 202 in respect of complaint under Section 138. The court has specifically considered that section 145 of the Act provides that evidence of the complainant may be given by him on affidavit which shall be read in evidence in any enquiry prior or proceeding notwithstanding anything in the court. The court observed that section 145(2) of the Act enables the court to summons & to examine any person as to the facts contained therein. There is no specific provision permitting the examination of the evidence on affidavit. Section 145 permits only the complainant to be examined by way of affidavit for the purpose of enquiry under Section 202.

19. Mr. Laddha, learned advocate for the respondent in petition No.1792/2019 adopts the argument of Mr. Sapkal, learned senior counsel. In addition Mr. Laddha submits that though the notice bears the dated 29-08-2018 however same is posted on 29-08-2018. Date i.e. 31-08-2018 is only

typographical mistake. Date of posting of notice is material and not the date written on the notice. That the scrutiny is made by the learned Magistrate. The order speaks for itself showing that court has applied its mind and thus this scrutiny. In view of this no any other enquiry is expected other than this. The complainant has also filed a separate affidavit. So, thus everything that could have been done in anyway under Section 202 is done. He relies on the judgment in the case of *Sunil Todi* (supra).

20. That if notice bears earlier date and it is posted after 30 days can it be said to be a valid notice. Answer would be no. This court feels that what is necessary to be seen the date of actual posting of notice and not the date of typed on notice. Since the account of the complainant is maintained at Aurangabad the cause of action will be to the court of Aurangabad. The cause of action 138 is where the cheque is dishonored and not where the complainant resides. Secondly, he submits that this point was not raised in the revision petition. He

further submits that day of received of intimation needs to be excluded & on excluding that day the notice is clearly sent within 30 days. In any case he submits that it is for the trial court to come to a conclusion on evidence on this aspect. He also relies upon the judgment in the case of *Sunil Todi* (supra). He submits that para 36 and 37 of the said judgment clearly discussed the purpose of enquiry under Section 202. Ultimately he submits that the petition deserves to be dismissed.

21. Since the question of 202 enquiry is common in both the petition said is discussed first. Two latest judgments of the Hon'ble Apex Court specifically dealing with the aspect of 202 enquiry need to be seen in this case. In the judgment suo moto writ petition No. 02/2022 the Hon'ble Apex Court has held that 202 enquiry is must.

22. Mr. Hon, learned senior advocate invited attention to para Nos.24 clause 3 which read as under:

“24. The upshot of the above discussion leads us to the following conclusions:

(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.”

23. From this it is clear that enquiry shall be conducted to see the compliance under Section 138 of the Act is there to arrive at conclusion that sufficient grounds to proceed against accused are present when the accused resides beyond territorial jurisdiction of the court. The evidence of the complainant shall be permitted to be taken on affidavit and in suitable cases the learned Magistrate can proceed only to examine documents without insisting for examination of evidence. The Hon'ble court thus has made it clear that it is mandatory to hold an enquiry. Manner of enquiry is left open to the Learned Magistrate. The learned Magistrate may even take evidence or even examine the documents only for the purpose of enquiry. No exact manner is provided of the enquiry. This shows that it is only to satisfy the Magistrate that a case is made out. The court has also considered the purpose of section 202 by considering the case of

Vijay Dhanuka Vs Najima Mamtaj. In para Nos. 11 and 12 are as under:-

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 exercise his jurisdiction were inserted by section 19 of the code of criminal procedure (Amendment) Act, (Central Act, 25 of 2005) w.e.f. 23-06-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against person 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 the 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 person as he thinks fit, for finding out whether or not there was sufficient ground for

proceeding against the accused.

The use of expression “shall” prim 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.

24. The Hon’ble Court considered use of expression ‘shall’ prima facie makes an enquiry or investigation by the learned Magistrate mandatory. In the context of the intention it can be held to be Directory word ‘shall’ may be directory and the word shall in all circumstances is not decisive. The Hon’ble Apex Court thereafter considered the section 145 of the N. I. Act which provides that the complainant may give his evidence on affidavit and that shall be read in evidence in an enquiry or in the trial or other proceeding. In para 47 the Hon’ble Court

considered in that case the learned Magistrate had adverted to; (i) complaint (ii) affidavit filed by the complainant (iii) evidence as per the evidence list (iv) submission of the complainant. Thus ultimately it is held that the learned Magistrate has to satisfy himself about genuineness of the complaint. Considering this position this court finds that in writ petition No.206/2023 the order of the learned Magistrate speaks that the court has considered the complainant verification statement-cum-affidavit of complainant and the documents filed on record. The court has also considered the arguments of the advocate for the complainant. The court has also gone through the judgment of the Hon'ble Apex Court in the case of S. P. Mani and Mohan Dairy Vs Dr. Snehalatha Elangovan in Appeal No.1586/2022 reported in 2022 Live Law (SC) 772.

25. In the case of Sunil Todi (supra) the Hon'ble Apex Court has considered section 202 enquiry as regards complaint under Section 138 of the N. I. Act. The Hon'ble Apex Court has considered said provision with reference to Suo Motu Writ

Petition (Cri) No. 2/2020 in para 46, 47 and 54 which is reproduced as under:-

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 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.

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.

54. In the present case, it is evidence that the principal grounds of challenge which have been set up on behalf of the appellants are all matters of defence at the trial. The Magistrate having exercised his discretion, it was not open to the High Court to substitute its discretion. The High Court has in a carefully considered judgment, analyses the submissions of the appellants and for justifiable reasons has come to the conclusion that they are lacking in substance.

26. By looking to the observations by the Hon'ble Apex Court it is clear that what needs to be seen by the learned Magistrate while issuing notice are the factors given in paragraph No. 47 of the said judgment. By looking to the orders in both the present petitions it is clear that this factor have been considered by the learned Magistrate while issuing process. This would sufficiently indicates that in fact enquiry under 202 is held though enquiry is held. From the order though the learned Magistrate have not said any expressed words that enquiry under 202 is held. Still from the orders one can gather that the learned Magistrate has considered from the enquiry under Section 202. For this reason also no interference is required.

27. Coming to the other judgments cited by Mr. Hon, learned senior advocate in the case of criminal application No.3194/1991 that the judgment of Sunil Todi was not pointed out to this court and therefore same was not considered. This court had considered the judgment in the case of expeditious trial. So far as the judgment in the case of Kisanrao Yadavrao Gadekar (Dr) Vs Changdeo Khanderao Phatangare and another reported in 2022 (6) MhLJ 510 is concerned the judgment in the case of Sunil Todi (supra) was not pointed out. The judgment in Sayed Mohammed Omair Sayed Ibrahim and others (supra) also need not be considered. In view of discussion the question would be only whether the learned Magistrate is required to expressly write in the order that he has held an enquiry under 202 is necessary so as to come to a conclusion that whether the learned Magistrate has applied the mind or not. What is material is to see that whether the learned Magistrate has applied his mind and whether otherwise the order reflects that the learned Magistrate has applied his mind and gone through the affidavit of evidence, documents etc. This court holds that whether

learned Magistrate has applied his mind needs to be gathered from the order itself. In both the cases in hand this court finds that Magistrates have considered all the aspect and have issued process.

28. So far as the question of delivery of notice within 30 days is concerned in writ petition No.7192/2019, this court finds that section 138 requires **giving** of notice within 30 days. Thus minutes the same has to frame exactly notice is sent by the post. In this case it is not disputed that though the notice of demand bears date as 30-08-2018, however, it was actually posted on 29-08-2018 and i.e. within 30 days. This court holds that there is no substance in the submission that a notice of demand was sent after 30 days.

29. So far as the notice to proprietary concern is not given to the proprietor is concerned, this court finds that proprietary concern is not juristic person and this submission does not require any consideration.

30. Rule stands discharged in both the petitions.

[KISHORE C. SANT, J.]

1. At this stage learned advocate for the petitioners in both writ petitions prays for continuation of interim relief. Learned advocate for respondent opposes the prayer.

2. Considering the fact that the interim relief is continued till today, same is continued for a period of four weeks from today.

[KISHORE C. SANT, J.]

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