

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

920 CRIMINAL WRIT PETITION NO.653 OF 2021

ANAND JAIKISHAN JINDAL
VERSUS
ZUBAIR MOTIWALA S/O. AMANULLAH MOTIWALA

...
Advocate for Petitioners : Mr. Vishal A. Bagdiya
APP for Respondents: Mr. S. S. Kazi
...

CORAM : R. M. JOSHI, J.
DATE : 19th AUGUST, 2023

PER COURT :

1. This petition takes exception to the order dated 04.03.2009 passed by learned Judicial Magistrate First Class, Aurangabad, in S.C.C. No. 4309/08 issuing process against the present petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act.

2. Perusal of the petition would show that the said order is challenged on two grounds, firstly, the petitioner is not the drawer of the cheque and that he is not concerned with the Jindal Tractors, a proprietary firm and secondly, in view of the fact that the accused has residence beyond the jurisdiction of the Magistrate, the compliance of

Section 202 of the Cr.P.C. was mandatory.

3. Learned counsel for the respondent submits that the learned trial Court has taken into consideration the facts as well as the documents on record and has rightly issued process against the petitioner. To buttress his submission, he placed reliance upon the judgment delivered by the Hon'ble Apex Court in *Suo Motu Writ Petition (Crl.) No. 2 of 2020*. It is observed in paragraph no. 24 (3), which reads as under : -

24(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.

4. The challenge to the order of issuance of process on the ground that neither the petitioner is drawer of the cheque nor is he proprietor of the proprietary firm i.e. Jindal Traders, cannot be taken into consideration at this stage. This defence should be available to the petitioner at the time of trial. It is not permissible for this Court to conduct mini trial at this stage. Thus, there is no substance in the contention of the petitioner.

5. As far as compliance of Section 202 of Cr.P.C. is concerned, the perusal of the title of the complaint filed before the learned Magistrate shows that the residence / business of the accused is at Jalna, the Magistrate at Aurangabad, admittedly, was required to comply with the mandatory provision of Section 202 of the Cr.P.C. It is settled law that the provisions of Section 202 of Cr.P.C. are mandatory in nature and non-compliance thereof will affect the validity of the order of issuance of process. The Hon'ble Apex Court, no doubt, in the aforesaid judgment in *Suo Motu Writ Petition (Crl) No. 2 of 2020*, held that in suitable cases the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses. However, such suitable case must be reflected from the order of Magistrate. In the instant case there is nothing in the impugned order to indicate that for what reason the learned Magistrate did not conduct any inquiry, instead he placed reliance on the documents on record. In view of this, there is non-compliance of provision Section 202 of Cr.P.C. while issuance of process and hence the **petition is allowed.**

6. The impugned orders dated 04.03.2009 passed by learned Judicial Magistrate First Class, Aurangabad and 16.01.2021 passed by learned Addl. Sessions Judge, Aurangabad in Criminal Revision Application No. 160 of 2019, are quashed and set aside.

7. The learned Magistrate is directed to consider the issuance of process afresh. In view of fact that the proceeding before the Magistrate is of the year 2008, such order be passed within one (01) month from today.

[R. M. JOSHI]
JUDGE

SG Punde