

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

**CRIMINAL WRIT PETITION NO.750 OF 2022  
WITH WP/728/2022**

**DR. ANITA PATIL DESHMUKH  
VERSUS  
ASHOK BABULAL AGRAWAL**

Mr. S. B. Talekar, Advocate for Talekar and Associates  
Mr. V. R. Dhorde, Advocate for the respondent

**CORAM : R. M. JOSHI, J.**

**DATE : 18<sup>th</sup> AUGUST, 2023**

**P.C. :-**

1. Heard by consent of both sides finally.
2. Criminal Writ Petition No. 750 of 2022 is preferred seeking quashment of S.T.C.C. No. 202/2021 filed by the respondent under Section 138 of Negotiable Instruments Act (for short 'NI Act') before JMFC, Shirpur, District Dhule and taking exception to the impugned order dated 08/03/2021 issuing process against the petitioner.
3. Criminal Writ Petition No. 728 of 2022 takes exception to order dated 04/04/2022 passed by the JMFC, Shirpur, District Dhule in the aforesaid proceeding seeking declaration of compounding of offence under Section 138 of NI Act in the light of memorandum of understanding executed between the petitioner and respondent.

4. The respondent herein had filed complaint before JMFC, Shirpur against the petitioner for the offence punishable under Section 138 of the NI Act and learned JMFC had issued the process against the petitioner/accused by passing order dated 08/03/2021. Accused appeared before learned JMFC and preferred an application Exhibit 10 for accepting the plea of compounding of the offence between the parties.

5. Learned counsel for the petitioner submits that the learned JMFC has committed error in not accepting plea of petitioner/accused for compounding of the offence vide application filed below Exhibit 10. By referring to the documents placed on record it is contended by him that the respondent herein was removed from the post of Secretary by resolution dated 15/12/2020. It is submitted that the cheque in question is also dated 15/12/2020. Thus, according to him on the face of it the cheque in question was not issued by the petitioner and as such no offence is made out against her. He sought to support his submission by placing reliance on the memorandum of understanding dated 22/07/2021 wherein according to him the respondent had agreed to compound the offence and withdraw the complaint filed before the learned Magistrate. In this regard reference is made to Section 147 of NI Act which makes the offence punishable under Section 148 of NI Act as compoundable. Relying upon the various documents it is sought to be

argued that the execution of the memorandum of understanding was in the presence of the son and employee of respondent and it is also executed in the presence of Advocates and hence there is no reason to discard the same. It is his submission that merely because the complainant/ respondent alleges that the memorandum of understanding has been obtained by force or coercion or with false promise, since his execution is not in dispute, there was no reason or justification for the learned JMFC to refuse to accept said compromise. To support his submission that even in case of unilateral act, compounding can be permitted, reliance is placed on the judgment of the Hon'ble Apex Court in case of ***Meters And Instruments Private Limited and another Versus Kanchan Mehta, (2018) 1 SCC 560.***

6. In support of his contention he placed reliance on following judgments.

- (i) M/s Krishnam Raju Finances, Hyderabad Versus Abida Sultana and another, 2004 SCC OnLine AP 1131,
- (ii) J. Daniel Versus State of Kerala and Anr., 2005 SCC OnLine Ker 366,
- (iii) Raj Kumar Khurana Versus State of (NCT of Delhi) and Another, (2009) 6 SCC 72,
- (iv) Virender Singh Versus Laxmi Narain and Anr, ILR (2006) II Delhi 1183,
- (v) S. Timmappa Versus L. S. Prakash, 2010 SCC OnLine Kar

5558,

(vi) Deepak Gaba and Others Versus State of Uttar Pradesh and another, (2023) 3 SCC 423,

(vi) Parth Bhadresh Mehta and others Versus State of Maharashtra and another, 2019 SCC OnLine Bom 405,

(vii) Dhariwal Tobacco Products Limited and another Versus State of Maharashtra and Another, (2009) 2 SCC 370,

(viii) Vijay and Another Versus State of Maharashtra and another, (2017) 13 SCC 317.

7. Learned counsel for the respondent opposed the said submission by referring to the application filed by the petitioner before the learned Magistrate i.e. Exhibit 10 wherein according to him the averments are made which do not form part of the memorandum of understanding. It is his submission that by filing reply to the said application the respondent/complainant has clearly denied the voluntariness of the said agreement. It is contended that the said agreement is obtained by coercion and also under false promise to pay dues. It is his further submission that the judgment of Hon'ble Apex Court in case of **Meters And Instruments Private Limited and another Versus Kanchan Mehta** (supra) does not apply to the present case as it is held therein that in the case where the complainant has received the adequate compensation, in such case it is permissible for the Court to accept the compromise even if moved unilaterally.

8. *Prima facie* perusal of the record indicates that the complainant had filed complaint after necessary compliance as contemplated by Section 138 of NI Act. A negotiable instrument carries presumptions under Sections 118 and 139 of NI Act. It is settled law that unless the presumption is rebutted by the accused, the complainant can not be called upon to prove legally enforceable debt, in view of the judgment of the Hon'ble Apex Court in case of ***Rangappa vs Sri Mohan, (2010) 11 SC 441***, which casts reverse burden.

9. Perusal of the record further indicates that the petitioner/accused herein claims that there is compromise arrived at between the parties and in pursuance thereto the memorandum of understanding came to be executed. The complainant though does not dispute that the execution of the said document however a categoric stand is taken by him that the said document is obtained by force or coercion and in alternate it is also stated that on the false promise of payment of salary, which was not paid in the year 2020.

10. The aforesaid facts indicate that there is a serious dispute raised by the complainant with regard to genuineness or binding nature of the agreement i.e. memorandum of understanding. Though it is a contention of the petitioner that the said memorandum of understanding was

witness by the son of the complainant and his employee as well as other witnesses, undisputedly this is not a public document which can be read in evidence without formal proof thereof. More particularly when there is specific denial of the voluntariness of the said agreement, the learned Trial Court has rightly held that it is a matter of evidence and only on the basis of evidence recorded the said issue can be determined.

11. No doubt Section 147 of NI Act provides that the offence under Section 138 NI Act is compoundable. For the purpose of compounding the voluntariness of the agreement between the parties would be an essential condition to accept the same. Here in this case, the voluntariness of the agreement has been specifically challenged by the complainant. In such circumstances unless the Court comes to the conclusion that the memorandum of understanding is voluntary and a valid contract, the same cannot become a basis for compounding of offence. Perusal of the judgment of Hon'ble Apex Court in case of ***Meters And Instruments Private Limited and another Versus Kanchan Mehta*** (supra) shows that the unilateral compounding is permissible provided the Court is satisfied that the accused has been adequately compensated the complainant in respect of the instrument in question. In this regard it is sought to be submitted by the learned counsel for the petitioner that the petitioner denies any liability as against the cheque in question and

hence it was not open for the learned Magistrate to observe that there is no payment of compensation. This could at the most to be a defence during the course of trial, but cannot be considered at this stage of proceeding. In the circumstances, no infirmity is found in the impugned order passed by the learned Magistrate.

12. In this case there is *prima facie* compliance of all requirements under Section 138 of NI Act to maintain a valid complaint. As regards the quashment of the complaint is concerned, it would be relevant to take note of judgment of Hon'ble Apex Court in case of ***State of Harayana and others Vs. Ch. Bhajan Lal and others, 1992 AIR 604.*** In this judgment Hon'ble Apex Court has considered in detail the scope of powers under Section 482 of Cr.P.C. and/or Article 226 of Constitution of India, to quash complaint. It is held therein that the High Court should not embark upon inquiry into merits and demerits of allegations. The quashment however may be allowed in following cases,

*1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*

*(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by*

*police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*

*(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*

*(4) xxx*

*(5) xxx*

*(6) xxx*

*(7) xxx*

13. Thus it is settled law that for the purpose of quashment of any proceeding the Court is required to prima facie consider the averments in the complaint and if no offence is made out as alleged against the accused, in such circumstances, the quashment of the proceeding is permissible. Ordinarily, Court cannot take in to consideration any other material for quashment of complaint. Though in extra ordinary circumstance Court may consider other material than the complaint. However, for decision of quashment of proceeding it is not open for the Court to consider defence of accused and to quash proceeding at drop of hat. In the instant case it cannot be said that the stand taken by the petitioner is an extra ordinary circumstance. The stand taken by

petitioner is a usual defence taken by any accused of offence punishable under Section 138 of NI Act where liability is denied. Having regard to the presumptions under Section 118 and 139 of NI Act applicable to the cheque in question, unless the same are rebutted there is no question of quashment of proceeding. Thus, it is not a case for quashment of the proceeding in question. Resultantly, Criminal Writ Petition No. 728 of 2022 deserves to be dismissed.

14. During the course of arguments learned counsel for the petitioner has raised issue with regard to the non compliance of Section 202 of Cr.P.C. In view of the fact that the petitioner/accused is resident of Mumbai i.e. Bhiwandi territorial jurisdiction of the learned JMFC is challenged to issue process sans compliance of Section 202 of Cr.P.C. In this regard learned counsel for the respondent raised objection about same being not taken as a ground in the petition. This Court however finds substance in the contention of the learned counsel for the petitioner that the issue involving pure question of law can be raised and entertained at any stage of the proceeding. Here in this case the record indicates that the accused is resident of Mumbai whereas the JMFC, Shirpur has issued process against her without compliance of Section 202 of Cr.P.C. which reads thus:

*"202. Postponement of issue of process.*

*(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding: Provided that no such direction for investigation shall be made,--*

*(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or*

*(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.*

*(2) In an inquiry under sub- section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath: Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.*

*(3) If an investigation under sub- section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer- in- charge of a police station except the power to arrest without warrant."*

. Bare perusal of this provision indicates that it is mandatory in nature. It requires a Magistrate to postpone issuance of process against accused residing beyond territorial jurisdiction of Court, until an enquiry is conducted through police or by Magistrate himself. Needless to say that such conduct of enquiry must be reflected from order of issuance of

process and record of the Court.

15. Learned counsel for the respondent has relied upon the observations of the Hon'ble Apex Court in Suo Motu Writ Petition (Cri.) No. 2/2020 wherein it is held that in suitable cases the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses. In response to the said submission learned counsel for the petitioner has submitted that from the perusal of the order of issuance process it does not appear that the learned Magistrate has applied his mind in order to the fact that it is a suitable case wherein even without examination of witness the process can be issued on the basis of examination of document.

16. Perusal of the impugned order shows that though there is reference made about the documents being perused by learned Magistrate however in order to dispense with the requirement of the compliance of Section 202 of Cr.P.C., appropriate reasons ought to have been recorded in the impugned order. The order in question, does not satisfy or demonstrate that this is a suitable case wherein the examination of document without insisting for the examination of witnesses and conducting any further enquiry. Even it is not permitted for this Court to supplant any reasons to the said order.

17. Resultantly for non compliance of mandatory provisions of Section 202 of Cr.P.C., order of issuance of process can not sustain.

18. Hence Criminal Writ Petition No. 750 of 2022 is partly allowed. The prayer for quashment of the proceeding is dismissed. The impugned order dated 08/03/2021 is set aside. The matter is relegated back to the learned Trial Court for decision afresh about the issuance of process as per law. In the peculiar facts and circumstances in the case since the accused has already appeared before the Court and has placed certain documents on record for passing order of issuance of process, learned Trial Court not to take in to consideration said documents placed on record by the accused.

19. Criminal Writ Petition No. 728 of 2022 stands dismissed.

**(R. M. JOSHI, J.)**

ssp