

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

CRIMINAL APPLICATION NO. 3194 OF 2022

Ismail Suleman Shaikh

.. Applicant

Versus

Hanif Rafique Sayyad

.. Respondent

Mr. Suvidh S. Kulkarni, Advocate a/w Smt. Rashmi Kulkarni, Mr. Vishal S. Kadam and Mr. Vivek V. Rathod, Advocate for the Applicant.

Mr. Suyashkumar S. Jangda, Advocate h/f Mr. Sachin S. Deshmukh, Advocate for Respondent.

CORAM : KISHORE C. SANT, J.

Date on which reserved for order : 05th January, 2023.

Date on which order pronounced : 22nd February, 2023.

ORDER :-

. This application is by original accused against whom a complaint under Section 138 of the Negotiable Instruments Act (for short “N.I. Act”) is filed by the respondent wherein, process is issued against this applicant. The applicant is therefore before this Court challenging the order of issuance of process passed by the learned Magistrate mainly on the ground that, the process is issued without following procedure under Section 202 of the Code of Criminal Procedure (for short “Cr.P.C.”).

2. The facts in short are that, the applicant supplies labour for sugarcane cutting. The respondent is also engaged in the business of supplying sugarcane cutting labour to the sugar factories. There was an agreement between the applicant and respondent for supply of labour. For supply of labour, the respondent transferred an amount of Rs. 10,00,000/- (Rs. Ten Lakh only) in installments through R.T.G.S. from the account of his brother. It is alleged that the said amount is withdrawn by the applicant. It is further alleged that, however, as per the agreement the applicant could not supply the labour. Since there was breach of agreement, the respondent insisted for return of the amount. The applicant therefore paid Rs. 2,00,000/- (Rs. Two Lakh only). Thereafter, for remaining amount of Rs. 8,00,000/- (Rs. Eight Lakh only) the applicant issued a cheque on 30.06.2021. On presenting the cheque, the same was returned for the reason "funds insufficient" on 09.07.2021. On that, a demand notice was issued. In spite of demand notice, as per the allegation, the applicant failed to pay the amount and therefore, a complaint came to be lodged in the Court of learned J.M.F.C. bearing S.C.C. No. 283/2021.

3. The learned Magistrate on perusing the complaint, verification of complaint and documents on record was pleased to issue process to the applicant after hearing learned counsel for the complainant by order

dated 01.10.2021. It is this order which is under challenge. The main issue on which the application is filed is of non observance of the procedure under Section 202 of the Cr.P.C., since the applicant is residing at Pangra, Taluka - Paithan, District – Aurangabad that is outside the territorial jurisdiction of the learned J.M.F.C., Georai.

4. Thus, since the issue is only about non observance of Section 202 of the Cr.P.C., learned advocate for the applicant relied upon the judgment of the Hon'ble Apex Court in **Re : Expeditious Trial of Cases Under Section 138 of the N.I. Act** reported in **AIR 2021 Supreme Court 1957** and points out that, the Hon'ble Apex Court in paragraph No. 24 has clearly drawn the conclusions which is reproduced here :

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

1) The High Courts are requested to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 of the Act from summary trial to summons trial.

2) Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the court.

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.”

5. Further, a reliance is placed upon the judgment of this Court in a case of **Satish alias Rajendra Harbans Tiwari and ors. Vs. State of Maharashtra and anr.** reported in **2010 CRI. L. J. 4089** wherein, it is held that, enquiry under Section 202 of the Cr. P. C. is necessary when the accused persons are residing beyond territorial jurisdiction of the Magistrate. Though the case was under Section 498-A of the Indian Penal Code, however, in submission of learned advocate for the applicant, it is applicable so far as the ratio in respect of Section 202 of the Cr. P. C. is concerned.

6. Learned advocate for the applicant further relied upon the judgment of the Hon'ble Apex Court in a case of **National Bank of Oman Vs. Barakara Abdul Aziz and another** reported in **(2013) 2 Supreme Court Cases 488** wherein, the Hon'ble Apex Court has considered the object and scope of enquiry under Section 202 of the Cr. P. C. In paragraph No. 12, the Hon'ble Apex Court has observed that, the High Court instead of quashing the complaint, should have directed the Magistrate to pass fresh orders following the provisions of Section 202 of the Cr. P. C. and the matter was remitted to the Magistrate for passing fresh orders.

7. Learned advocate for the applicant also produced on record circular issued by the High Court wherein, the procedure for

conducting enquiry under Section 202 of the Cr. P. C. is laid down. He thus submits that, even on the administrative side this High Court has made it mandatory to follow the procedure under Section 202 of the Cr. P. C.

8. Learned advocate for respondent relied upon the judgment of the Hon'ble Apex Court in a case of **S. K. Sinha, Chief Enforcement Officer Vs. Videocon International Ltd. & Ors.** reported in **2008 AIR (Supreme Court) 1213**. The Hon'ble Apex Court in paragraph No. 13 held that, the Magistrate is not bound to issue process against the accused as a matter of course. It is further held that, the underlying object of the enquiry under Section 202 is to ascertain whether there is *prima facie* case against the accused. Paragraph No. 13 is reproduced as below :

“13. Chapter XV (Sections 200-203) relates to “Complaints to Magistrates” and covers cases before actual commencement of proceedings in a Court or before a Magistrate. Section 200 of the Code requires a Magistrate taking cognizance of an offence to examine the complainant and his witnesses on oath. Section 202, however, enacts that a Magistrate is not bound to issue process against the accused as a matter of course. It enables him before the issue of process either to 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 there is sufficient ground for proceeding further. The underlying object of the inquiry under Section 202 is to ascertain whether there is *prima facie* case against the accused. It thus allows a Magistrate to form an opinion whether the

process should or should not be issued. The scope of inquiry under Section 202 is, no doubt, extremely limited. At that stage, what a Magistrate is called upon to see is whether there is *sufficient ground for proceeding with the matter* and not whether there is *sufficient ground for conviction of the accused.*”

9. Taking into consideration all the above judgments and specially ratio laid down in the case of **Satish alias Rajendra Harbans Tiwari and ors.** (supra), this Court finds that, it is clear that, it is mandatory to conduct an enquiry under Section 202 of the Cr. P. C. when the accused is resident beyond territorial jurisdiction of the Magistrate. This Court finds that, a clear case is made out to call for interference in the matter making out a case to quash the order of issuance of process. However, in view of the judgment in the case of **National Bank of Oman** (supra), this Court finds that, in the interest of justice to quash the order dated 01.10.2021 issuing process against the applicant and to remit this matter to the Magistrate for passing fresh order by keeping in view the judgment.

10. The impugned order dated 01.10.2021 is quashed and set aside.

11. The learned Magistrate is directed to pass fresh order by following procedure of Section 202 of the Cr. P. C.

12. The criminal application stands disposed off.

(KISHORE C. SANT, J.)

PS.B.