

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

CRIMINAL WRIT PETITION NO. 1473 OF 2022

Mr. Ashwinkumar Shivprakash Sharma .. Petitioner

Versus

The State of Maharashtra & Anr. .. Respondents

Mr.A.S. Tilve, Advocate for the petitioner.
Mr.S.W. Mundhe, APP for the respondent/State.
Mr.A.D. Kulkarni, Advocate for respondent No.2.

CORAM	:	KISHORE C. SANT, J.
RESERVED ON	:	07.12.2022
PRONOUNCED ON	:	08.02.2023

ORDER :-

01. Heard learned Advocates for the parties. Taken up for final disposal with the consent of the parties.

02. This petition is by the accused in the proceeding initiated under section 138 of the Negotiable Instruments Act challenging an order passed by the learned Extra Joint District Judge & Additional Sessions Judge, Aurangabad dated 06.10.2022 in Criminal Revision Application No.221 of 2022, whereby the order of issuance of process is confirmed by dismissing the

criminal revision application. A short question involved in the petition is in respect of inquiry as contemplated under section 202 of the Cr.P.C. The accused claims to be resident of a place outside the territorial jurisdiction of the Court, which issued the process. The main ground on which the issuance of process is challenged is that the learned JMFC did not follow the mandate under the said section and issued the process.

03. The respondent/original complainant lodged a complaint bearing SCC No.4729 of 2022 in the Court of JMFC at Aurangabad. It is alleged that the cheque issued by the petitioner-accused for an amount of Rs.3,50,000/- came to be dishonoured on its presentation for the reason “funds insufficient”. A notice was, therefore, issued to the petitioner. The notice was issued on three addresses of the petitioner. In spite of service of notices, the amount was not paid and therefore the complaint was lodged. All the three notices issued on the different addresses were returned back, with reasons (i) no such person in the address (ii) incomplete address (iii) refused. It is specifically averred that, therefore, all these notices are deemed to have been served on the accused and on that basis the complaint was lodged.

04. In the complaint following three addresses of the accused for service of notice were given, are as follows :-

- i) Mr. Ashwinkumar Shivprakash Sharma
R/o. H.No.5-3-139, Police Colony,
Gosha Mahal, Nampalli, Hyderabad,
Telangana-500012.
- ii) House No.606, Building No.A-1,
Blue Bells, MIDC, Chikalthana,
Aurangabad.
- iii) Quality Wire Products
Plot No.20, Back Side of
K-88, Gut No.34/36,
MIDC, Waluj, Aurangabad.

. In the complaint it is specifically averred that the accused is running a factory under the name and style of “Quality Wire Products” in Waluj, MIDC, Aurangabad. Along with the complaint verification affidavit was also filed. The complaint was lodged on 25.05.2022. The learned JMFC, Court No.16, Aurangabad on 15.06.2022 passed the following order :-

“Perused the complaint, affidavit of the complainant. I have perused the documents placed on record minutely. Upon verification of the complainant, it reveals that, he has made out a prima facie case against the accused for issuance of process under section 138 of the Negotiable Instrument Act. Accordingly, issue process against the accused under section 138 of the Negotiable Instruments Act.”

05. The petitioner filed a revision bearing Criminal Revision Application No.221 of 2022 in the Sessions Court at Aurangabad. It is specific ground of the petitioner that he is resident of Hyderabad and therefore issuance of process without following procedure under section 202 of Cr.P.C. was illegal. The learned Trial Judge has ignored the mandatory inquiry under section 202 of the Cr.P. C. A judgment of 5 Hon'ble Judges of Hon'ble Supreme Court is quoted in the grounds itself in Suo Motu petition i.e. in respect of Expeditious Trial of Cases Under Section 138 of N.I. Act, 1881 reported in 2021 ALL MR (Cri) 2641. It is further a ground was taken that order of issuance of process should reflect that learned Magistrate has applied his mind. In the present case, no such application of mind is reflected. Various other judgments are quoted in the revision itself. Some of them will be considered in the later paragraphs.

06. It was argument of the respondent-complainant that the addresses given are of the petitioner and two addresses are from Aurangabad. Notice at Waluj was returned with an endorsement as refused to accept and therefore it needs to be treated as proper service.

07. The learned Sessions Judge after hearing the parties held that it must be established that the accused is residing outside the jurisdiction of the Court of the concerned Magistrate. The learned Sessions Judge considered and took a view that the accused is not residing beyond jurisdiction of the Court issuing process and therefore there was no question of conducting inquiry under section 202 of the Cr.P.C.

08. Being aggrieved by this order now the petitioner is before this Court. The question, therefore, before this Court is as to whether in the present case it was necessary to postpone the issuance of process by following mandate of section 202 of the Cr.P.C. or whether the complainant has shown that the accused is resident of a place within the territorial jurisdiction of the Court issuing the process. Other question thereafter would be whether the learned Magistrate has rightly issued process by applying mind.

09. Thus, in the argument the learned Advocate for the petitioner mainly relied upon judgment in Suo-Motu Writ Petition (cited Supra). The Hon'ble Supreme Court has specifically held that in the offence of dishonour of cheque, it is mandatory to follow the procedure of holding inquiry by the

Magistrate before issuing process. It is held that the inquiry to be held by the Magistrate before issuance of summons for accused residing outside the jurisdiction of the Court cannot be dispensed with. On the basis of this judgment even guidelines are issued by this Court and same are relied upon by the petitioner. In the circular directions Nos.2 and 3 read as under :-

“2. On receipt of any complaint under section 138 of N.I. Act, wherever it is found that any accused is resident of the area beyond the territorial jurisdiction of the magistrate concerned, an inquiry shall be conducted by the magistrate to arrive at sufficient grounds to proceed against the accused as prescribed under section 202 of Cr.P.C.

3. While conducting any such inquiry under section 202 of Cr.P.C., the evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the magistrate may restrict the inquiry to examination of documents without insisting for examination of witnesses for satisfaction as to the sufficiency of grounds for proceeding under the said provision.”

. Rule 3 permits that the evidence of witness on behalf of the complaint shall be permitted to be taken on affidavit. In suitable cases the Magistrate may restrict the inquiry to examination of documents without insisting for examination of witness for satisfaction as to the sufficiency of grounds for proceeding under the said provision.

10. Thus, when it is held that the procedure is mandatory, at the same time as per the directions, evidence of witnesses can be taken on affidavit. The inquiry also can be restricted to examination of documents without examination of witnesses for the purpose of satisfaction as to sufficiency of grounds for proceeding under the same provision. Thus, it is clear that while issuing process, if it is found that the accused is residing outside the jurisdiction, then an inquiry is mandatory. The learned Advocate for the respondent fairly concedes to this position. However, he has pressed into service another point that in this case the accused is resident of the place within the jurisdiction of the Court and therefore in this case the inquiry was not necessary. His other submission is that the complaint itself is lodged with affidavit/verification of the complainant. Same would in-fact form part of the evidence. He relies upon section 145 of the NI Act to submit that the evidence on affidavit is permissible and therefore filing of affidavit is sufficient for the purpose of verification. Therefore, the Magistrate is right as by reading the verification affidavit, he has issued the process. He submits that from reading of the order of the Magistrate it is clearly seen that the Magistrate has passed the order after perusing the documents and upon verification of the complaint. Thus, the process is issued by proper application of mind and

therefore it be held that the inquiry as contemplated under section 202 of the Cr.P.C. is recorded. He also placed reliance on Clause (3) of the circular of the High Court, which permits that the evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. Thus, he submits that on both counts the requirement is satisfied, firstly that evidence is taken and secondly the documents are examined.

11. He further submits that inquiry under section 202 of the Cr.P.C. is mainly for the purpose to ensure that there is substance in the complaint. This inquiry need not be a fishing inquiry. At this stage the entire onus cannot be placed totally on the complainant. Thus, he submits that inquiry is already conducted.

12. In rejoinder the petitioner submits that it is not proved by the complainant that the accused was residing at the address within the territorial jurisdiction.

13. These submissions will have to be tested in view of the judgment relied upon by the parties. First judgment obviously is in suo-motu writ

petition. Since both the parties have accepted that position, it is not felt necessary to discuss the said judgment.

14. Next judgment is in the case of Vijay Dhanuka Etc vs Najima Mamtaj Etc.(2014) 14 SCC 638, wherein it is clearly held that expression “shall” prima facie makes the inquiry or investigation, as the case may be, by the Magistrate mandatory. However, it is held that no specific mode or manner of inquiry is provided under section 202 of the Cr.PC.

15. Next judgment is of Nagpur Bench of this Court in the case of Rainbow Papers Ltd. Vs. State of Maharashtra reported in MANU/MH/2148/2021. This judgment is delivered by considering the Supreme Court judgment in suo-moto writ petition. The Court has also considered the circular issued by this High Court . In that view, it is held that the order passed by the Magistrate was quashed and set aside as the mandatory requirement was not satisfied.

16. Next judgment is in the case of Sunil Todi Vs. State of Gujarat, AIR 2021 SC 137. This was a case arising out of proceedings under section

138 of the NI Act. In this case also the Hon'ble Apex Court has held that conducting inquiry is mandatory before issuance of process. In this judgment the Hon'ble Apex Court considered various other judgments.

17. Thus only question is as to whether the accused is resident of the place within the jurisdiction of the Magistrate. For that we need to see the averments in the complaint. In the complaint it is mentioned that the accused is running factory at MIDC area Waluj. The notices of demand were sent on three addresses. The notices sent on all the three addresses were returned with endorsement as given in the opening paras of this judgment. It is only that the date was wrongly mentioned on the notice as 11.04.2020 instead of 11.04.2022. Further the averments show that the cheque was issued at Aurangabad. Bank is also situated at Aurangabad and therefore the cause of action occurred at Aurangabad. It is clearly seen that two addresses are from Aurangabad within the jurisdiction of the Magistrate. It is not the case of petitioner that the addresses are incorrect. The only ground is that accused resides at Hyderabad. There is no specific denial that the addresses given of Aurangabad are not addresses of the petitioner/accused. In the petition it is only stated that the accused is not resident of the local jurisdiction of the

learned JMFC. His further grounds show that he disowns the company at Waluj and that he was never in possession of the said company. Further ground is that it was necessary for the Court to get itself satisfied about the address of the accused. If this ground is accepted then it would be for the Magistrate to first verify the addresses given in the complaint and then to issue notice. So far as the other ground of non-application of mind, this Court finds that there is no substance as order clearly shows that the Court had gone through the documents, verification etc. and then only process was issued. The petitioner further relied upon judgments in the case of **Pepsi Foods Limited and Anr. Vs. Special Judicial Magistrate & Ors., (1998) 5 SCC 749** to submit that issuance of process is a serious thing in criminal matter. Criminal law cannot be set into motion in mechanical manner. There is no doubt about the said proposition.

18. Thus, considering that though it is necessary to follow the mandatory procedure when the accused is residing outside of territorial jurisdiction of the Court, however, in this case two addresses are of Aurangabad. Therefore, it cannot be said that the accused was not residing within the territorial jurisdiction. Expecting the Court to first verify the

address would be nothing but to add unnecessary procedure before issuance of process and is not expected in law. If the accused raises dispute about the address, then it is necessarily for him to raise dispute in the main trial itself. No accused can expect the Court to first go on verifying address and only then to issue summons thereafter. This Court finds that no case is made out on the facts of this case. The petition is, therefore, dismissed.

[KISHORE C. SANT, J.]