

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

CRIMINAL WRIT PETITION NO. 1416 OF 2021

**ONEUP ENTERTAINMENT PVT. LTD. THROUGH ITS
AUTHORIZED SIGNATORY MR. NITIN DARA
VS
VISHWAKALYAN MULTISTATE CREDIT CO-OP SOCIETY LTD,
BRANCH GULMANDI AURANGABAD**

Mr. Rahul Totala, Advocate a/w Mr. Rajat Malu, Advocate for the
petitioner

Mr. Irfan D. Maniyar, Advocate for the respondent

CORAM : KISHORE C. SANT, J.

RESERVED ON : 20th DECEMBER, 2022

PRONOUNCED ON : 22nd FEBRUARY, 2023

P. C.

1. This criminal writ petition is by a company shown as accused in a complaint filed by the respondent for an offence punishable under Section 138 of the Negotiable Instruments Act. The learned JMFC on the basis of complaint issued process against the petitioner and the same was challenged by way of filing criminal revision application in the Sessions Court, Aurangbad. Learned Additional Sessions Judge rejected the revision of the petitioner by order dated 25-10-2021 and thus, the petitioner is before this court. Main ground in the petition is about non following of the procedure under Section 202 of the

Code of Criminal Procedure and secondly that necessary averment as to attract Section 141 of the Negotiable Instruments Act is absent in the complaint.

2. The facts in nutshell are that :

a] The petitioner, a company incorporated under the Companies Act, approached the respondent Credit Cooperative Society having its office at Aurangabad for loan for the purpose of producing of film namely Sab-Kushal-Mangal. Pursuant to an agreement respondent advanced loan of Rs.6 crore. However, it is alleged that there was default in making payment and therefore, respondent issued a notice. Thereafter petitioner issued cheque towards discharge of its liability for Rs. 11,55,27,000/- bearing No. 402131 dated 30-03-2021 drawn on Indusind Bank in favour of the respondent. The respondent presented the said cheque for encashment on 30-03-2021. However, the said came to be returned with memo dated 31-03-2021 with an endorsement 'Funds Insufficient'. On that notice was issued on 28-04-2021. The petitioner replied to the said notice vide communication dated 31-05-2021 stating that respondent is not entitled to recover any loan and the petitioner is also not liable to pay the amount as demanded. It is stated that amount is wrongfully and illegally demanded without cause of action. It is stand of the petitioner that there was no transaction of loan between the parties and there is no question

of payment of interest.

b] Since there was no payment made pursuant to the demand the respondent lodged the compliant on 13-09-2021. Even the petitioner had lodged the compliant with the police station Andheri (w), Mumbai. It was informed that the respondent had issued four cheques of Rs.1,50,00,000/- each to the petitioner company. However, same were given wrongly to 'One Entertainment India Pvt. Ltd.' instead of 'One Entertainment Pvt. Ltd.' Before entering into the contract a security cheque was issued bearing No. 402131 and the same has been illegally presented by the respondent and prosecution is started. It was requested to the police station that FIR be registered under Sections 406 and 420 of the IPC. In the meantime in the complaint that was lodged bearing SCC No. 4580/2021 Learned JMFC, Aurangabad vide order dated 26-06-2021 issued process against the accused persons. Summons was served on director Rita Panchamiya. She appeared and furnished a bail.

3. The petitioner challenged the order of issuance of process by filing Criminal Revision Application No. 151/2021 through Nitin Dara on the grounds as stated in the earlier paragraph. The learned Additional Sessions Court framed three points :-1] Whether the order passed by leaned JMFC Court 26th June 2021 and 26th August 2021 vide Exh.1 and Exh.6 are incorrect and

improper? 2] Whether the applicant has locus to file a revision? & 3] Whether the order warrants interference and is liable to be set aside?.

4. The learned Additional Sessions Judge while answering the question about following of procedure under Section 202, observed that the learned trial court has gone through the contents of the complaint, documents filed on record and examination on oath and after making due inquiry the learned trial court prima facie formed opinion that it had territorial jurisdiction to take cognizance and try the offence. It is held that there is no substance in the submission that the trial court had not followed mandate laid down under Section 202. The judgment cited by the petitioner in the criminal writ petition No. 2/2020 Re: expeditious trial of cases under Section 138 of the N. I. Act, 2021 SCC Online 325 is not applicable.

5. So far as the second objection raised in respect of the variance in the amount of cheque the court expressed that there is variance in respect of amount of loan and amount of cheque. But held that this aspect can be decided at the time of trial. As regards the locus of Nitin Dara is concerned it is observed that in the complaint Rita Panchamiya is shown as director of petitioner and therefore, summons were issued against her and since she failed to appear even bailable warrant was issued against her. The court held that she was director and therefore, revision

application filed by Nitin Dara is not maintainable. So far as the averments and the grounds that Nitin Dara is not shown as accused is concerned it is observed that he had no nexus with the matter. The specific ground taken by the petitioner in the revision in respect of averments as required under Sections 141 is concerned the Sessions Court has not dealt with said ground and dismissed the revision by judgment and order dated 25-10-2021.

6. Now the petitioner is before this court. The main ground as stated by the petitioner is that there is no averment in the complaint as required under Sections 141 of the N. I. Act. The revision is wrongly dismissed holding that Nitin Dara has no locus. Further ground that amount of cheque is more than amount of alleged liability. The amount of cheque is Rs.11,55,27,000/- whereas in para No. 3 of the complaint itself it was stated that loan was advanced of Rs.8,76,00,000/-. It is submitted that the notice of demand was sent only to the company. He submits that in view of the judgment in Criminal Writ Petition No.2/2020 reported in 2021 SCC Online 325 regarding expeditious trial, it was incumbent upon the trial court to hold an inquiry under Section 202 as the petitioner is residing beyond territorial jurisdiction of the learned Magistrate. Even the Sessions Court has not dealt with this aspect sufficiently. He further submitted that Rita Panchamiya had already resigned and therefore, there was no question of suing

the petitioner company by showing her as a director and for that he produced on record form No.2 No. DIR-12 pursuant to section 7(1)(c) 168 and 170(2) of the Companies Act, 2013 and rules thereunder saying that she resigned from the Directorship on 15-06-2021. The learned advocate for the petitioner further relied upon the following judgments:

1. *(2021) SCC Online SC 806 in the case of Ravindranath Bajpe VS Manglore Special Economic Zone Ltd. and others,*
2. *2001 SCC Online Mad 822 in the case of Angu Parameshwari Textiles (P) Ltd. and Ors Vs Shri Rajam and Co.*
3. *2022 SCC Online SC 1598 in the case of Pawan Kumar Goel Vs State of UP and another.*

7. The learned Advocate Mr. Maniyar, for the respondent original complainant, vehemently opposed the petition. He argued that it is Rita Panchamiya who has signed cheque and documents for the purpose of loan from the respondent society. He submits that demand notice was issued on 28-04-2021. Cheque was presented on 30-03-2021. Resolution was in the name of present representative is dated 13-08-2021, therefore, company is rightly sued through the director. So far as the variance in the amount of the liability of the cheque he submits that amount of interest is added to the loan amount and therefore, prima facie there appear variance however same is to be considered at the stage of trial. As

regards following of Section 202 Mandate he submits that from the order passed by the learned JMFC, it is clear that the learned JMFC has gone through the documents, averments of the complaint and has applied her mind which is clear from the order and thus due inquiry is held by the learned JMFC.

8. He submits that though the Magistrate has not specifically used word as inquiry under Section 202 however, looking to the order it is clear that the court has gone through the documents on record such as demand notice, cheque return memo and the affidavit filed by the complainant, it can be gathered that inquiry is held by the learned Magistrate and as such he supports the order passed by the learned trial court as well as the sessions court.

9. Now coming to the judgment cited by the parties at bar which needs to be considered before appreciating the case and coming to any conclusion. The judgment in the case of Pawan Kumar Goel is as regards section 141 of the N. I. Act. In para 16 it is held that it is incumbent on the part of the complainant to make necessary averments in the complaint that at the time when the offence was committed, the person accused was in charge of and is responsible for conduct of the business of the company. It is held that this averment is essential under Section 141 of the N. I. Act. By considering various judgments, the Hon'ble Apex Court in para 25 held that if the complainant

fails to make specific averments against the company and its directions in the complaint for commission of an offence under Section 138 of the N. I. Act the same cannot be rectified by taking recourse to general principals of criminal jurisprudence. The provision of Section 141 imposes vicarious liability by deeming fiction. Therefore, unless the company or firm has committed the offence as a principal accused, the person mentioned in sub-section (1) and (2) would not be liable to be convicted on the basis of principles of vicarious liability. The court further considered the case of State of Hariyana Vs Brij Lal Mittal and held that no error was committed by the High Court in allowing the writ petition and quashing the order and the proceeding under Section 138.

10. In the case of Suo Motu Writ Petition (Cri) No. 2 of 2020 regarding expeditious trial of cases under Section 138 of the N. I. Act. it is held that procedure under section 202 is mandatory and without making inquiry under Section 202 where the accused resides beyond the said jurisdiction of the court, the order issuing process is illegal by issuing the various guidelines providing the manner in which inquiry is to be conducted. Thus, this court finds that the petitioner has rightly placed reliance upon this judgment.

11. Next judgment is again on the point of 202 in the case of Ravindranath Bajpe (supra) wherein the Hon'ble Apex

Court has held that inquiry under Section 202 is must. In the case of Angu Parameshwari Textiles (P) Ltd (supra) it was held that the amount of cheque cannot be more than amount due and in that view of the matter the proceedings under Section 138 were quashed and set aside.

12. In view of the above discussion this court finds that the submission of the respondent does not have any force in view of the judgments which are discussed above, though it is filed to show that the learned trial court has rightly passed the order while considering the complaint verification and documents. However, he could not satisfy the court so far as the non-observance of section 202 in view of the judgment in the case of expeditious disposal and also in view of the judgment in the case of Ravindranath Bajpe (supra).

13. Coming to the present case it is clearly seen that there is no averment as required under Section 141 of the N. I. Act. In the entire complaint there is no whisper about the liability of the Director. The amount of cheque is clearly more than amount shown to be due against the petitioner /accused. In view of the judgments cited above, complaint thus is not maintainable. On looking to the order of issuance of process, it is clear that the said order is passed only after perusing the complaint and the documents placed on record and examined of the complainant under Section 200 of the Cr. P. C. Learned JMFC

has held that cheque in question was given by the accused to the complainant towards discharge of debt and liability. Thus, the order is seen to have been mechanically passed. From the complaint itself it is clear that the address given of the respondent is of Andheri West Mumbai i.e. out of territorial jurisdiction of the court and therefore, it was mandatory to hold an inquiry in the matter. On this count also there is clear failure on the part of the learned JMFC.

14. The petitioner had sufficiently shown that Nitin Dara has authority to present the revision and the writ petition.

15. From the judgment of the learned Additional Sessions Judge also it is seen that though clearly a case was made out by the petitioner that no procedure under Section 202 of the Cr. P. C. was followed still the learned Additional Sessions Court failed to appreciate this aspect on the count of locus of Nitin Dara also the court has failed to appreciate that Nitin Dara had the locus to file revision. It was necessary to hold that the learned Magistrate had issued the order of process without observing the mandate under Section 202. This court holds that both the courts have thus committed an error. A clear case is made out to quash the order of issuance of process and proceeding of the complaint SCC No. 4580/2021.

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16. With the above discussion the criminal writ petition is thus allowed in terms of prayer clause-B and disposed off.

[KISHORE C. SANT, J.]

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