

Andreza

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 121 OF 2022**

Vithoba Sakaram Mayekar

... Petitioner

Versus

VPK Urban Cooperative Credit Society Ltd. & ...Respondents
anr.

**Mr. Aurobindo Gomes Pereira, Advocate for the
Petitioner.**

Mr. Jatin Ramaiya, Advocate for the Respondent No.1.

**Mr. G. Nagvenkar, Additional Government Advocate for
the Respondent No.2.**

**CORAM: M. S. KARNIK, J.
DATED: 24th MARCH 2023**

ORAL ORDER

1. Heard learned Counsel for the Applicant.
2. This is a Criminal Writ Petition filed under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.), challenging an order dated 04.05.2022 passed by the learned Judicial Magistrate First Class, at Panaji, in Criminal Case No.OA/78/NIA/2022/D.
3. My attention is invited to the Order dated 20.12.2022 passed by this Court. In view of the decision of the Hon'ble Supreme Court, referred to in the later part of this Order, I felt it appropriate to hear the controversy in its challenge to the impugned Order on merits.

The Respondent No.1 filed the complaint before the learned Judicial Magistrate First Class, at Panaji under Section 138 of the Negotiable Instruments Act, 1881, (for short, '*N.I. Act*').

4. The learned Counsel for the Respondent No.1, inviting my attention to the Order passed by this Court, submitted that the conduct of the Petitioner dis-entitles from claiming any reliefs in this Petition. Learned Counsel for the Petitioner, however, invited my attention to the Order dated 04.05.2022 passed by the Judicial Magistrate First Class, Panaji, issuing process to the Petitioner under Section 138 of the N.I. Act. The Order is dated 04.05.2022. The order reads thus :

“ ORDER BELOW Exhibit C-01
(Delivered on 04/May/2022)

Placing reliance on the Judgment of Mr. Rajesh Chalke V/s. State of Maharashtra in 2011 ALL MR (Cri) 64, the Hon'ble Bombay High Court where it was held that "For the purpose of issuing process under Section 200 of the Code of Criminal Procedure, 1973, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the Negotiable Instruments Act, 1881 and the Magistrate is not obliged to call upon the complainant to remain present before the Court, nor to examine the complainant or his witnesses upon oath for taking the decision whether or not to issue process, on the complaint under Section 138 of the Negotiable Instruments Act, 1881. It is only if and where

the Magistrate, after considering the complaint under Section 138 of the Negotiable Instruments Act, 1881 and the documents produced in support thereof and the verification in the form of affidavit of the complainant, is of the view that examination of the complainant or his witness is required, that the Magistrate may call upon the complainant to remain present before the Court and examine the complainant and/or his witness upon oath for taking decision whether or not to issue process on the complaint under Section 138 of the Negotiable Instruments Act, 1881.

Thus from the Affidavit, documents on record and upon pursuing the Complaint, I am inclined to pass the following:

ORDER

Issue process to the Accused under Section 138 of the Negotiable Instrument Act, 1881, returnable on next date of hearing.”

5. Learned Counsel for the Petitioner submitted that the Supreme Court of India, in a Suo Motu Writ Petition (CRL.) No. 2 of 2022, had occasion to consider the aspect regarding requirement of inquiry under Section 202 of Cr.P.C. It is the submission of the learned Counsel that the process is issued in complete breach of the provisions of Section 202 of Cr.P.C. It is submitted that the Petitioner was residing outside the jurisdiction of the Magistrate, therefore, the requirement of Section 202 ought to have been satisfied before the Magistrate could have issued process. In support of his submission, learned Counsel relied on paragraph 10 of the

decision of the Supreme Court in the case of Expeditious Trial of Cases under Section 138 of N. I. Act, 1881, which reads thus :

“10. Section 202 of the Code confers jurisdiction on the Magistrate to conduct an inquiry for the purpose of deciding whether sufficient grounds justifying the issue of process are made out. The amendment to Section 202 of the Code with effect from 23.06.2006, vide Act 25 of 2005, made it mandatory for the Magistrate to conduct an inquiry before issue of process, in a case where the accused resides beyond the area of jurisdiction of the court. (See: **Vijay Dhanuka & Ors, V. Najima Mamtaj & Ors.** (2014) 14 SCC 638, **Abhijit Pawar V. Hemant Madhukar Nimbalkar and Anr.** (2017) 3 SCC 528 and **Birla Corporation Limited v. Adventz Investments and Holdings Limited & Ors.** (2019) 16 SCC 610). There has been a divergence of opinion amongst the High Courts relating to the applicability of Section 202 in respect of complaints filed under Section 138 of the Act. Certain cases under Section 138 have been decided by the High Courts upholding the view that it is mandatory for the Magistrate to conduct an inquiry, as provided in Section 202 of the Code, before issuance of process in complaints filed under Section 138. Contrary views have been expressed in some other cases. It has been held that merely because the accused is residing outside the jurisdiction of the court, it is not necessary for the Magistrate to postpone the issuance of process in each and every case. Further, it has also been held that not conducting inquiry under Section 202 of the Code would not vitiate the issuance of process, if requisite satisfaction can be obtained from materials available on record.

11. The learned Amici Curiae referred to a Judgment of this Court in **K. S. Joseph v. Philips Carbon Black Ltd & Anr. (2016) 11 SCC 105** where there was a discussion about the requirement of inquiry under Section 202 of the Code in relation to complaints filed under Section 138 but the question of law was left open. In view of the judgments of this Court in **Vijay Dhanuka** (supra), **Abhijit Pawar** (supra) and **Birla Corporation** (supra), the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot be dispensed with. The learned Amici Curiae recommended that the Magistrate should come to a conclusion after holding an inquiry that there are sufficient grounds to proceed against the accused. We are in agreement with the learned Amici.”

6. Learned Counsel for the Respondent No.1, on the other hand, supported the Order passed by the learned Judicial Magistrate First Class. It is submitted that the Applicant has simply taken a chance and at this stage has raised a contention that requirements of Section 202 are not fulfilled. It is further submitted by the learned Counsel for Respondent No.1 that before the learned Judicial Magistrate First Class, the Petitioner had agreed to settle the matter and, therefore, had submitted writ jurisdiction of the Magistrate.

7. In my opinion, having regard to the law laid down by the Supreme Court, in the case of **Expeditious Trial of Cases under Section 138 of N. I. Act, 1881** (supra), the Magistrate should come to a conclusion after holding an inquiry that there are sufficient

grounds to proceed against the Accused, when such Accused resides beyond the territorial jurisdiction of the Court. Admittedly, the Petitioner was residing beyond the territorial jurisdiction of the Trial Court. The Magistrate should come to a conclusion after holding an inquiry that there are sufficient grounds to proceed against the Accused. This requirement is not satisfied in the present case.

8. The impugned order, therefore, deserves to be set aside. The Petition is accordingly allowed. The Magistrate may proceed with the complaint after complying with the requirement of an inquiry as stipulated by the Hon'ble Supreme Court in Paragraph 11 of the aforementioned Judgment.

9. It is made clear that the Petitioner must cooperate with the learned Judicial Magistrate First Class in the expeditious disposal of the complaint if upon inquiry the learned Judicial Magistrate First Class is satisfied that process is to be issued. The learned Judicial Magistrate First Class, Panaji, is requested to expedite the complaint.

10. Writ Petition stands disposed of.

M. S. KARNIK, J