

VRJ

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO.1482 OF 2023

Bharath Automobiles & Ors ... Petitioners
V/s.
The State of Maharashtra & Anr. ... Respondents

Mr. Adithya Iyer with Mr. Jayesh Bhosale with Mr. Advait Helekar & Manuj Borkar & Nyayosh Bharucha for the petitioners.

Mr. M.G. Patil, APP for the respondent No.1/State.

Mr. Nikhil Rajani with Adv. Snepy Ambawat i/by M/s. U. Deshpande & Co. for the respondent No.2.

CORAM : AMIT BORKAR, J.

DATED : APRIL 25, 2023

P.C.:

1. Challenge in this petition is to the order dated 3rd April 2019 passed in a proceedings under section 138 of the Negotiable Instruments Act, 1881.

2. The respondent No.1 filed a complaint under section 138 of the Negotiable Instruments Act, 1881 contending that the accused No.1/Company through accused No.2 and with knowledge and consent of accused no.3 approached the complainant with request for short term financial facility of Rs.1,50,00,000/-. Accordingly, the complainant disbursed loan of Rs.1,50,00,000/-. The accused

No.2 executed demand promissory note in favour of the complainant acknowledging disbursement of amount. Thereafter, the accused No.1 approached the complainant for renewal cum enhancement of existing facility of Rs.50,00,000/- which was sanctioned on 26th May 2017. Therefore, total loan disbursed in favour of the accused was to the tune of Rs.2,00,00,000/-. Towards satisfaction of the said legally enforceable liability, accused No.1 issued cheque of Rs.1,61,48,178/- which was dishonoured. After following procedure as required under section 138 of the Negotiable Instrument Act, 1881, the complaint was filed on 23rd August 2018.

3. By order dated 3rd April 2019, the learned Magistrate issued process against the petitioners. While issuing process, it appears that the learned Magistrate has considered complaint along with affidavit of verification. Based on satisfaction that accused Nos.2 and 3 are partners of accused no.1/Company, and ingredients of section 138 are complied with, the learned Magistrate issued process against the petitioners for offence under section 138 read with section 141 of the Negotiable Instruments Act, 1881. Challenge to the said order is made by present petition.

4. Learned advocate for the petitioners submitted that based on same transaction and one agreement, the complainant has filed two complaints for dishonour of two different cheques. Paragraph Nos.2 to 7 of both the complaints are identical. Since both the complaints arise out of identical transaction, the complaints are not maintainable.

5. I have considered the submissions made on behalf of the petitioners. No provision of law or any precedent is pointed out in support of his submission that filing of complaint based on one agreement and one transaction, independent dishonour of cheque is not maintainable. Considering scheme of section 138 of the Negotiable Instruments Act, 1881, independent cause of action gives rise to filing of independent complaint. If the court is satisfied that the ingredients of section 138 are fulfilled, the learned Magistrate is entitled to issue process.

6. The next submission is that initial loan was Rs.1,50,00,000/- and the cheques issued which are subject matter of two complaints are of Rs.1,61,48,178/- and Rs.1,56,07,312/-, demonstrate that there is no legally recoverable liability. The said submission is in ignorance of paragraph 7 of the complaint which states that in addition to Rs.1,50,00,000/-, amount of Rs.50,00,000/- was sanctioned to the complainant. The factum as to whether the total amount of cheque is legally recoverable or not is purely question of facts. At the stage of issuance of process, unless there is unimpeachable document on record which shows that the amount sought to be enforced on the face of it is not legally recoverable, the submission of the petitioners cannot be accepted.

7. The next ground urged by the petitioners is that the petitioners are residing outside territorial jurisdiction of the Magistrate and inquiry under section 202 is mandatory. Such inquiry is not held and, therefore, order of issuance process is barred.

8. The position of law in relation to holding of inquiry under section 202 has been delineated by the Apex Court in the case of **Sunil Todi and Others vs. State of Gujrat and Another** reported in (2021) SCC OnLine SC 1174, paragraph 46 reads as under.

“46. Section 145 of the NI Act provides that evidence of the complainant may be given by him on affidavit, which shall be read in evidence in an inquiry, trial or other proceeding notwithstanding anything contained in the CrPC. The Constitution Bench held that Section 145 has been inserted in the Act, with effect from 2003 with the laudable object of speeding up trials in complaints filed under Section 138. Hence, the Court noted that if the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. Consequently, it was held that Section 202(2) CrPC is inapplicable to complaints under Section 138 in respect of the examination of witnesses on oath. The Court held that the evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses and in suitable cases the Magistrate can examine documents to be satisfied that there are sufficient grounds for proceeding under Section 202.”

9. The Apex Court has held that in every case under section 138 of the Negotiable Instruments Act, 1881, it is not necessary that the witnesses should be examined. If the material on record is sufficient to make out prima facie case, inquiry under section 202 can be held in absence of witnesses if complainant has given affidavit of complaint. The impugned order indicates that such order has been passed by the Court based on complaint along with affidavit of verification. The alleged defect of inquiry under section 202 can be cured during affidavit of evidence. The learned Magistrate has recorded prima facie satisfaction about compliance

of requirements under section 138 of the Negotiable Instruments Act, 1881. There is no indication on reading of the order that inquiry under section 202 is not held. The fact that complaint was filed on 23rd August 2018 and the order of issuance of process is dated 3rd April 2019, shows that the Magistrate postponed the decision to issue process on a future date and, thereafter, considering the complaint and affidavit of verification has held inquiry under section 202 and has passed impugned order. Hence, the ground of not holding inquiry under section 202 is not available to the petitioners.

10. The third contention raised on behalf on the petitioners is that the complaint with the Magistrate had no territorial jurisdiction to entertain complaint. It is submitted that one complaint is filed in the Court at Ballard Pier and second complaint is filed before at the Esplanade Court. The territorial jurisdiction of the learned Magistrate is decided as per section 142A of the Negotiable Instruments Act, 1881. It is the branch of payee bank which confers jurisdiction on the Court. Therefore, merely because two complaints are filed at two different places by itself does not raise ground for challenging order of issuance of process on the ground of lack of territorial jurisdiction.

11. Last ground urged by the learned advocate appearing on behalf of the petitioners is that the averments in clause 14 of the complaint that the complainant has already filed one case before same Trial Court regarding the same transaction is false. According to the learned advocate for the petitioners, the case referred in

paragraph 14 has been filed in different Court and, therefore, the statement is false. In my opinion, the statement made in paragraph 14 is inconsequential and has no relevance on merits of the matter and, therefore, even if such statement is incorrect, it will be of no consequence and does not affect the validity of order of issuance of process. There is no merit in the writ petition.

12. The writ petition is, therefore, dismissed. No costs.

(AMIT BORKAR, J.)