

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

CRIMINAL APPLICATION NO.954 OF 2023

Chandrashekhar Gangadhar OgaleApplicant
Versus
The State of Maharashtra
and another Respondents

Dr. Uday P. Warunjikar, Advocate i/b. Siddhesh Pilankar for the Applicant.

Mr. Arfan Sait, APP for the Respondent No.1-State.

Mr. Sanjeev Kadam, Advocate a/w. Prabhakar M. Jadhav, for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 03rd NOVEMBER, 2023

P.C. :

1. The Applicant has challenged the order dated 16.9.2021 passed by the Judicial Magistrate, First Class, Deogad in Summary Criminal Case No.183/2021 issuing process under Section 138 of the Negotiable Instruments Act against the present Applicant. The Applicant has also challenged the order dated 7.7.2023 passed by the Additional Sessions Judge at Sindhudurg in Criminal Revision Application No.17/2022 whereby the order passed by learned Magistrate for issuance of

process was upheld.

2. The complaint is filed by the Respondent No.2 herein. The Applicant was the distant uncle of the complainant. It is the case of the complainant that he had given Rs.83 Lakhs on the Applicant's request for the purpose of his business. The Applicant returned Rs.8 Lakhs and around Rs.75 Lakhs were due and payable by the Applicant to the complainant. Out of that amount, the Applicant in part payment issued a cheque of Rs.40 Lakhs dated 14.4.2021 issued on IndusInd Bank, Kothrud, Pune. That cheque was dishonored and after following the due procedure the complaint was filed.

3. Learned Magistrate passed order dated 16.9.2021 and issued process against the Applicant. While passing the order, learned Magistrate noted that he had perused the complaint, verification and documents filed on record. Thereafter he gave his reasons for issuing process. Said order was challenged in Criminal Revision Application No.17/2022 before the Additional Sessions Judge, Sindhudurg, which was dismissed vide order dated 7.7.2023.

4. Heard Dr. Uday Warunjikar, learned counsel for the Applicant, Mr. Arfan Sait, learned APP for the Respondent No.1-State and Mr. Sanjeev Kadam, learned counsel for the Respondent No.2.

5. The main and only contention of Dr. Warunjikar appearing for the Applicant was that the title of the complaint itself shows that the complainant was residing at Dahibav, Taluka – Deogad, District-Sindhudurg and the address of the Applicant was mentioned in the complaint as Laxmi Park Colony, Navi Peth, Pune. He, therefore, submitted that since the Applicant was residing outside the jurisdiction of learned Magistrate, the inquiry under Section 202 of Cr.P.C. was mandatory. He submitted that the order passed by learned Magistrate does not show that any witnesses were examined by the Magistrate before issuance of process and, therefore, inquiry under Section 202 of Cr.P.C. was not conducted.

6. Dr. Warunjikar submitted that the Revisional Court proceeded on the erroneous observation that the Applicant had already appeared before learned Magistrate and has furnished

the bail bonds and, therefore, at this stage the order of issuance of process could not be abruptly set aside. Dr. Warunjikar submitted that this is factually incorrect as the Applicant never appeared before the trial Court and has not furnished the bail.

7. Learned counsel for the Respondent No.2 opposed these submissions. He invited my attention to the Revisional Court's order wherein the a reference was made to the judgment of the Hon'ble Supreme Court in the case reported in **AIR 2021 SC 1957** passed in Suo Motu Writ Petition (Crl.) No.2/2020 decided on 16.4.2021.

8. I have considered these submissions. The Hon'ble Supreme Court in the aforesaid judgment has dealt with this issue. In this context, paragraphs-12 & 24 are important which read thus :

“12. Another point that has been brought to our notice relates to the interpretation of Section 202(2) which stipulates that the Magistrate shall take evidence of the witness on oath in an inquiry conducted Under Section 202(1) for the purpose of issuance of process. Section 145 of the Act provides that the evidence of the complainant may be given by him on affidavit, which shall be read in evidence in any

inquiry, trial or other proceeding, notwithstanding anything contained in the Code. Section 145(2) of the Act enables the court to summon and examine any person giving evidence on affidavit as to the facts contained therein, on an application of the prosecution or the Accused. It is contended by the learned Amici Curiae that though there is no specific provision permitting the examination of witnesses on affidavit, Section 145 permits the complainant to be examined by way of an affidavit for the purpose of inquiry Under Section 202. He suggested that Section 202(2) should be read along with Section 145 and in respect of complaints Under Section 138, the examination of witnesses also should be permitted on affidavit. Only in exceptional cases, the Magistrate may examine the witnesses personally. Section 145 of the Act is an exception to Section 202 in respect of examination of the complainant by way of an affidavit. There is no specific provision in relation to examination of the witnesses also on affidavit in Section 145. It becomes clear that Section 145 had been inserted in the Act, with effect from the year 2003, with the laudable object of speeding up trials in complaints filed Under Section 138. 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. On a holistic reading of Section 145 along with Section 202, we hold that Section 202(2) of the Code is inapplicable to complaints Under Section 138 in respect of examination of witnesses on oath. 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. In suitable cases, the Magistrate can examine documents for satisfaction as to the sufficiency of grounds for proceeding Under Section 202.

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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.
- 4) We recommend that suitable amendments be made to the Act for provision of one trial against a person for multiple offences Under Section 138 of the Act committed within a period of 12 months, notwithstanding the restriction in Section 219 of the Code.

- 5) The High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint Under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonour of cheques issued as part of the said transaction.
- 6) Judgments of this Court in Adalat Prasad (supra) and Subramaniam Sethuraman (supra) have interpreted the law correctly and we reiterate that there is no inherent power of Trial Courts to review or recall the issue of summons. This does not affect the power of the Trial Court Under Section 322 of the Code to revisit the order of issue of process in case it is brought to the court's notice that it lacks jurisdiction to try the complaint.
- 7) Section 258 of the Code is not applicable to complaints Under Section 138 of the Act and findings to the contrary in Meters and Instruments (supra) do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the Trial Courts to reconsider/recall summons in respect of complaints Under Section 138 shall be considered by the Committee constituted by an order of this Court dated 10.03.2021.
- 8) All other points, which have been raised by the Amici Curiae in their preliminary report and written submissions and not considered herein, shall be the subject matter of deliberation by the aforementioned Committee. Any other issue relating to expeditious disposal of complaints Under Section 138 of the Act shall also be considered by the Committee.”

Thus, there is clear observation of the Hon'ble Supreme Court that for conduct of the inquiry under Section 202 of Cr.P.C., evidence of the witnesses on behalf of the complainant shall be permitted to be taken on affidavit and in suitable cases the Magistrate can restrict the inquiry without insisting for examination of the witnesses.

9. In the present case, the opening paragraph of the order passed by the learned Magistrate itself shows that he had perused the complaint, verification and documents filed on record. Thus, he has applied his mind in due compliance with the requirement of Section 202 of Cr.P.C. in this particular case. He has also considered the documents filed on record. This is due compliance of the guidelines of the Hon'ble Supreme Court. Therefore, on that ground the order of issuance of process can not be set aside. With the result, no relief can be granted in this application. The Application is dismissed.

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by
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(SARANG V. KOTWAL, J.)