

VRJ

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

**WRIT PETITION NO.3090 OF 2022
WITH
WRIT PETITION NO.3091 OF 2022**

1. Hubtown Limited, through
its Authorized Representative
Mr. Ali Murtaza, Age 50 years,
501, 5th Floor, Plaza Panchsheel,
“A” Wing, Hughes Road,
Behind Dharam Palace,
Grant Road (W), Mumbai 400 007
2. Vyomesh Mahipatray Shah,
S/o. Mahipatray Shah,
Aged about 62 years,
Managing Director,
M/s. Hubtown Limited,
501, 5th Floor, Plaza Panchsheel,
“A” Wing, Hughes Road,
Behind Dharam Palace,
Grant Road (W), Mumbai 400 007 ... **Petitioners**

V/s.

1. Ashok Commercial Entperise,
A partnership firm registered
under the Indian Partnership
Act, 1932, through its partner

Mr. Ramesh Uttamchand
Ramchandani, Aged about 68 yrs.
Occupation Business, and having
its office at 12th Floor, 126,
Free Press House, 215,
Nariman Point, Mumbai 400 021

2. The State of Maharashtra,
PWD Building, V.N. Road,
Mumbai – 400 032

... Respondents

Mr. Aabad Ponda, senior advocate a/w Mr. Harsh
Ghangurde i/by Mr. Raj Raut for the petitioners.

Mr. Ajeet Manwani a/w Mr. Faizal Vora i/by A & A
Legal for the respondent No.1.

Mr. A.R. Patil, APP for the respondent No.2/State.

CORAM : AMIT BORKAR, J.

RESERVED ON : DECEMBER 8, 2022

PRONOUNCED ON : JANUARY 23, 2023

JUDGMENT:

1. This petition under article 227 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1973 (hereafter “CrPC”, for short) assails the legality, propriety and correctness of order dated 23rd October, 2018 passed by the learned Metropolitan Magistrate, 28th Court, Esplanade, Mumbai issuing process against the petitioners for offence under section

138 of the Negotiable Instruments Act, 1881 (hereafter “NI Act”, for short) and order dated 29th July 2022 passed by the learned Additional Sessions Judge, Greater Mumbai in Criminal Revision Application No.1418 of 2019 confirming order of issuance of process.

2. Considering limited issue involved in these petitions, only those facts which are necessary for adjudication of the said issue are stated.

3. The respondent No.1 is the complainant who has filed a complaint under section 138 of the NI Act. The learned Metropolitan Magistrate 28th Court, Esplanade, Mumbai by order dated 23rd October, 2018 issued process against the petitioners and others. The said order of issuance of process was challenged before the learned Sessions Court. The learned Sessions Court by the impugned order confirmed the order of issuance of process.

4. Being aggrieved, the petitioner has invoked writ jurisdiction of this Court.

5. Mr. Aabad Ponda, learned senior advocate for the petitioners submitted that the verification statement of the complainant under section 200 has been affirmed before the Judicial Clerk, Metropolitan Magistrate, 28th Court, Esplanade, Mumbai. The advocate for the complainant has signed above expression ‘before me’ at the end of verification statement. The Judicial Clerk has no power to record verification under section 200 of the CrPC. The verification as contemplated under section 200 needs to be done by the Magistrate personally and not by the Judicial Clerk. The

complainant had option of filing affidavit as contemplated by section 145 of the NI Act, to skip normal procedure contemplated under section 200 of the CrPC. It is open for complainant to file his verification on the basis of an affidavit under section 145 of the NI Act. The manner of preparation of verification and filing of affidavit has been settled by earlier binding precedents which are as under:

A.C. Narayanan v. State of Maharashtra & Another reported in (2014) 11 SCC 790; **Amar Singh v. Union of India and Others** reported in (2011) 7 SCC 69; and unreported judgments of this Court in the case of **Sayed Anwar Ahmed v. The State of Maharashtra and Another**, Criminal Writ Petition No.924 OF 2016 dated 27th and 28th February, 2017; **M/s. TRL Krosaki Refractories Ltd. v. M/s SMS Asia Private Limited & Anr**, Criminal Appeal No.270 of 2022 dated 22nd February, 2022.

6. *Per contra*, the learned advocate for the respondents supported the impugned order submitting that the complaint is supported by verification affirmed before Judicial Clerk . On 23rd October 2018, the complainant was examined and verification on solemn affirmation was recorded by the learned Magistrate endorsed by the Judicial Clerk. The learned Magistrate has approved such verification by making remark “seen”. This Court on administrative side by notification dated 30th July, 2015 bearing Notification No.A(slp)/Misc/332/2015 has empowered all Judicial Clerks to act as Commissioner of Oath to administer oath and affirmed affidavits concerning judicial proceedings in Court of the

Chief Judicial Magistrate, Additional Chief Judicial Magistrate and Metropolitan Magistrate Courts in India. The learned Magistrate issued process after being satisfied of *prima facie* case against petitioners. The learned Sessions Judge has rightly observed that once Judicial Clerk has administered oath to the complainant, it is not necessary that oath needs to be administered by the learned Magistrate again. In support of his submission he relied on the judgments in **Dinesh Vaishnav V/s Kishor Kumar Gupta** reported in MANU/MP/0005/2015; **Rajkumar Harwani V/s Sagar & Ors.** reported in (2012) SCC OnLine Bom 778; **Raj Kumar Singhania V/s Ashok Jain** reported in (2011) SCC OnLine Chh 157; **K. Srinivasa V/s Kashinath** reported in 2004 CRI L.J 4566; **Rekha Singh V/s Virendranath Mukharjee** reported in MANU/CG/0423/2012; **Mandvi Coop Bank Ltd V/s Nimesh** reported in MANU/SC/0016/2010; **Indian Bank Association V/S Union of India** reported in (2014) 5 SCC 590; **Meters & Instruments Pvt. Ltd. V/s Kanchan Mehta** reported in (2018) 1 SCC 560; **Bhushan Kumar & Anr. V/s State (NCT of Delhi) & Anr.** reported in AIR (2012) SC 1747; **Uday Shankar Triyar V/s Ram Kalewar Prasad Singh & Ors.** reported in (2006) 1 SCC 75.

7. I have given my anxious consideration to the rival submissions.

8. The precise issues, which may arise for consideration of this court, may be formulated thus (i) whether order of issuance of process is bad for non compliance of verification required under section 200 of Code of Criminal Procedure and (ii) whether defect

in verification required under section 200 of Code of Criminal Procedure can be cured by examination of the complainant as per section 145 of Negotiable Instruments Act.

9. In my opinion, necessity to decide first issue does not arise considering answer to second issue.

10. The second issue is no longer *res integra* in view of the judgment of the Apex Court in **K.S. Joseph Vs. Philips Carbon Black Ltd. & Anr.** reported in (2016) 11 SCC 105. In the said case, objection to the order of issuance of summons on the ground of non-compliance of section 200 of the CrPC was turned down by the High Court. Before Apex Court, the accused urged that cognizance of complaint under section 138 could not have been taken without complying with the mandate of section 200 of the CrPC and without examining complainant on solemn affirmation. While answering the said submission, the Apex Court in paragraph 3 to 5 held as under:

“3. So far as the issue of examination of complainant on solemn affirmation under Section 200 of the Cr.P.C. is concerned, the submissions are misconceived on account of Section 145 of the Act which was inserted along with some other Sections through an amendment in the year 2002 w.e.f. 6.2.2003. Section 145 of the Act is as follows :

“145. Evidence on affidavit. — (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the

application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.”

4. The non obstante clause in sub-section (1) of Section 145 is self-explanatory and over-rules the requirement of examination of the complainant on solemn affirmation under Section 200 of the Cr.P.C. Now the complainant is entitled to give his evidence on affidavit and subject to all just exceptions, the same has to be read in evidence in any enquiry, trial or other proceeding under the Cr.P.C.
.....

5. In view of discussion made above, the plea based on Section 200 of the Cr.P.C. is rejected as untenable.
.....”

11. The conspectus of the aforesaid decision is that the defect of verification under section 200 of the CrPC can be cured by the complainant by filing his evidence on affidavit during trial.

12. Several decisions have been cited on behalf of petitioner but in my opinion they hardly require to be considered in detail in view of ratio laid down in **K. S. Joseph** (Supra).

13. The upshot of aforesaid discussion is that challenge to the order of issuance of process is misplaced, resultantly, I am persuaded not to entertain the petition.

14. Hence, both the writ petitions stand dismissed. No costs.

(AMIT BORKAR, J.)