

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 3849 of 2022

A.T. Deb @ Ashutosh Deb

Versus

**West Bengal Essential Commodities Supplies Corporation
Ltd. & Another**

For the Petitioner : Mr. Ayan Bhattacharjee, Adv.
Mr. Arpit Choudhury, Adv.
Mr. Suman Majumdar, Adv.

For the O.P. No. 1 : Mr. Rajib Roy, Adv.

Heard on : 26.06.2024

Judgment on : 13.09.2024

Ajay Kumar Gupta, J:

1. By filing this Criminal Revisional application under Section 482 of the Code of Criminal Procedure, 1973, the petitioner being the accused has assailed the Judgment and Order dated 6th September, 2022 passed by the Court of the Learned Chief Judge, City Sessions Court at Calcutta in Criminal Revision No. 123 of 2022, thereby affirmed the Order dated 20th May, 2022 passed by the Court of the Learned Metropolitan Magistrate, 16th Court at Calcutta in connection with a Complaint Case No. C/9561 of 2005 filed under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881.

2. By the said order dated 20th May, 2022, the Learned Metropolitan Magistrate had rejected the prayer of the petitioner for conducting an enquiry under Section 202 of the CrPC and fixed a date for cross-examination of P.W. 1.

3. The sum and substance of the case is that the OP No. 2 being the Director of the Company, namely, West Bengal Essential Commodities Supplies Corporation Limited has filed a petition of complaint under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881 (in short 'NI Act') to the Court of Learned Metropolitan Magistrate, 16th Court at Calcutta against the petitioner herein.

3a. The complainant has alleged, *inter alia*, that the petitioner no. 1 being the Director of M/s. Gems Refineries (1997) Private Limited having its office at 14, P.N. Banerjee Road, P.O. and P.S. – Budge Budge, District – South 24 Parganas, Pin Code No. 743319 has issued 22 cheques of different amounts on the different dates aggregating to a sum of Rs. 5,17,00,000/- only in favour of the complainant to discharge its existing liabilities which was accrued out of business transaction between the accused and the complainant.

3b. Those cheques were presented on 9th and 12th September, 2005 with the Central Bank of India, New Market Branch having its office at New Market, P.S. – New Market at Calcutta 700 001 but the said cheques were dishonoured by the bankers of the accused/petitioner on the ground of “insufficient funds”. Such intimation has been received from the said bank on the same dates i.e. on 9th and 12th September, 2005, but in spite of issuing notice upon the accused person in or about 5th October, 2005, failed to pay the same. The notice was received and acknowledged by the accused person on 8th October, 2005.

3c. The accused committed an offence under Section 138 read with Section 142 of the NI Act, 1881 since issuance of cheques is

prima facie a conclusive proof of the accused existing liability. The said cheques were issued by the accused person with ulterior motive and mala fide intention, as at the time of issuance of the said cheques, the accused person was fully aware of the fact that the same could be dishonoured as those cheques were issued intentionally and deliberately with full knowledge of having insufficient funds with its bankers. As such, the complainant has been compelled to file a complaint under Section 138 read with Section 142 of the NI Act, 1881 and as amendment therein and prayed for taking cognizance against the accused person.

3d. The Learned Magistrate issued summons after taking cognizance against the accused person under Section 138 read with Section 142 of the NI Act, 1881. Petitioner appeared and filed a petition under Section 202 of the CrPC contending therein that the accused person is residing beyond the territorial jurisdiction of the Learned Magistrate as such, the Learned Magistrate ought to have resorted to further enquiry under Section 202 of the CrPC prior to issuance of the process of summons against the accused person. The Learned Magistrate rejected the application filed by the accused vide Order dated 20th May, 2022 after hearing the parties.

3e. Being aggrieved by and dissatisfied with the Impugned Order dated 20th May, 2022, the petitioner herein filed a Criminal Revisional application before the Learned Chief Judge, City Sessions Court at Calcutta being Criminal Revision No. 123 of 2022 challenging the legality, propriety and correctness of the Impugned Order. The Learned Chief Judge, after hearing the parties, affirmed the Order dated 20th May, 2022 passed by the Learned Metropolitan Magistrate, 16th Court, Calcutta as, *inter alia*, as follows: -

“11. 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.

*The same view has been reflected in **Sunil Todi & another's** case passed on 03.12.2021 by Hon'ble Apex Court.*

12. *In the present case, the Ld. Magistrate had held the evidence of the complainant on affidavit and this means that the Magistrate had already held an inquiry by herself and so the Magistrate has power to postpone section 202 Cr.P.C by holding inquiry by holding separate agencies.*

13. *If that be so, this Court finds that the impugned order passed by the Ld. Magistrate requires no interference and thus, the impugned order is affirmed.”*

Under the above circumstances, the present Criminal Revisional application has been filed before this Hon'ble High Court and came up before this Bench for its disposal.

4. Learned counsel, representing the petitioner, submitted that the petitioner/accused resides beyond the territorial jurisdiction of the Court of the Learned Magistrate. Prior to issuing process against the accused under Section 138 read with Section 142 of the NI Act, 1881, the Learned Magistrate ought to have resorted to further

enquiry under Section 202 of the Code of Criminal Procedure because Section 202 of the CrPC provides mandatory enquiry in respect of accused person, who is residing beyond the jurisdiction of the Learned Court and the same was amended in the Code of Criminal Procedure, which came into effect from June 23, 2006 i.e. much after issuance of process against the accused but after pronouncement of the Special Bench Judgment of the Hon'ble Supreme Court now it has become mandatory in nature to conduct enquiry under Section 202 of the CrPC even in a case under Section 138 of the NI Act. The Five-Judge Bench of the Hon'ble Supreme Court of India in Suo Motu Writ Petition (Cri) No. 2 of 2020 in re: **expeditious trial of cases under Section 138 of NI Act, 1881** reported in **AIR 2021 Supreme Court 1957 at para 24** has made it clear that such enquiry under Section 202 of the CrPC is mandatory in nature. The Hon'ble Supreme Court had held as follows:

“Enquiry shall be conducted on receipt of the complaint under Section 138 of the Act to arrive at sufficient ground to proceed against the accused when such accused resides beyond the territorial jurisdiction of the Court.”

4a. It is further submitted that the obligation of holding such mandatory enquiry under Section 202 of the CrPC is vested upon the Learned Trial Magistrate. But the Learned Trial Magistrate completely erroneously issued process against the accused. As such, the petitioner/accused filed an application before the Learned Trial Magistrate praying for enquiry under Section 202 of the CrPC which is mandatory in nature but despite the said facts, the Learned Trial Magistrate failed to cure such illegality for salvation of justice. It is also incumbent duty of the Learned Magistrate to rectify such error when the application has been filed by the petitioner but the same was rejected. Not only that, the Learned Magistrate failed to rectify such error even indicated by the petitioner. The Learned Chief Judge also failed to consider the observation of the Hon'ble Apex Court passed in a case **K.S. Joseph Vs. Philips Carbon Block Limited** reported in **(2017) 1 SCC (Cri) 270** wherein the Hon'ble Apex Court held that *"Postponement of issue of process by Magistrate – Purpose of - Held, is to avoid unnecessary harassment to proposed accused – Complaint regarding dishonour of cheque under S. 138, NI Act – Plea of appellant- accused, that he being resident of area outside territorial jurisdiction of Magistrate who issued summons, an enquiry within meaning of S. 202 CrPC was mandatory, and since that was not done, order of cognizance and issuance of summons was bad in law"*.

4b. The learned counsel further placed reliance upon several judgments with regard to the enquiry under Section 202 of the CrPC is compulsory as under:

*i. Abhijit Pawar v. Hemant Madhukar Nimbalkar and another*¹;

*ii. Sunil Todi and Ors. V. State of Gujarat and Anr.*²;

*iii. Krishna Nand Shastri and Others v. State of Jharkhand*³.

4c. It was further submitted that the Learned Sessions Judge also neglected/ignored the observation of the Learned Trial Magistrate to the effect that since the opposite party no. 1 being public servant of Government of West Bengal undertaking so his examination under Section 200 of the CrPC followed by the enquiry in terms of Section 202 of the CrPC was not mandatory in the present case is grossly erroneous finding as such same is liable to be set aside. Section 202 of the CrPC does not discriminate between a public servant and/or a private individual. Hence, in the present case, even if the complainant's examination under Section 200 of the CrPC can be eliminated because the complainant is public servant

¹ AIR 2017 SC 299;

² AIR 2022 SC 147, AIROnline 2021 SC 1120;

³ 2023 SCC OnLine Jhar 517.

but that does not entitle the Court to do so with the enquiry under Section 202 of the CrPC, which is mandatory in nature. In order to see that innocent persons should not be harassed by filing a frivolous application as such, the legislative amended sub-section (1) of Section 202 of the CrPC to make it obligatory upon the Magistrate before summoning the accused residing beyond his jurisdiction, he shall enquire into the case himself or direct investigation is to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there are sufficient grounds for proceeding against accused persons.

4d. Finally, the learned counsel submitted that if the initial action, taken by the Learned Trial Court, is flawed, then all subsequent actions would be flawed as such, the Judgment and Order passed by the Learned Chief Judge as well as Order dated 20th May, 2022 passed by the Learned Trial Magistrate is liable to be set aside. Consequently, the entire proceeding is also liable to be quashed. To bolster his contention, he further placed reliance upon the judgments delivered in the cases as under:

1. *State of Punjab v. Davinder Pal Singh Bhullar and Others*⁴ reported in and

2. *Odi Jerang v. Nabajyoti Baruah & Ors.*⁵

5. Per contra, the learned counsel appearing on behalf of the opposite parties vociferously opposed the submission made by the learned counsel appearing on behalf of the petitioner and further argued that the judgments referred by the learned counsel for the petitioner are not at all applicable in the present facts and circumstances of the case. In the present case, complainant is a Public Servant and had filed complaint under Section 138 read with Section 142 of the N.I. Act, 1881 and in those cases, Sections 200 and 202 of the CrPC are not even applicable, when complaint filed by the Public Servant with an affidavit pursuant to Section 145 of the N.I. Act, 1881. It is true that Section 202 of the CrPC was amended for conducting an enquiry before issuing of process which came into effect from 23.06.2006 but such enquiry is not at all applicable if requisite satisfaction can be obtained by the Learned Magistrate from the materials available on the record. Rather, the judgment in Re: **expeditious trial of cases under Section 138 of the NI Act, 1881**

⁴ (2011) 14 SCC 770;

⁵ (Special Leave to Appeal (Crl) no(s). 2135/2022).

referred by the learned counsel appearing on behalf of the petitioner is not applicable in the present facts and circumstances.

5a. The complaint was supported by an affidavit. The Learned Trial Court has examined the witness and further relied upon the materials available on the record and after being satisfied himself issued process. According to the amendment provided under Section 145 of the NI Act, 1881, affidavit may be accepted as an evidence during enquiry or trial as a consequence during enquiry under Section 200 of CrPC instead of examining the complainant, a Magistrate can accept the affidavit affirmed by him. When there is such provision for acceptance of complainant on the basis of affidavit affirmed by him, the compliance of Section 202 of CrPC is not at all required or applicable in respect of the trial of an offence under Section 138 of the NI Act, 1881. Accordingly, the Learned Trial Magistrate had rightly rejected the prayer for enquiry as provided under Section 202 of the CrPC because there is no specific mode and manner of enquiry is provided under Section 202 of the CrPC. The enquiry envisaged under Section 202 of the CrPC, the witnesses are examined whereas under Section 200 of CrPC, the examination of complaint only is necessary with the option of examining the

witnesses present, if any. Accordingly, the instant Criminal Revisional application has no merits and is liable to be dismissed.

In support of his submission, he placed reliance upon the judgments delivered in the cases as under:

- i. S. S. Binu v. State of West Bengal and another*⁶
- ii. Sunil Todi and Ors. V. State of Gujarat and Anr.*⁷
- iii. M/s. Trend Bags and Another Vs. State of West Bengal and Another*⁸

DISCUSSION AND FINDINGS OF THIS COURT:

6. In view of the above submissions and arguments made by the learned counsels appearing for the parties and upon perusal of the contents of the complaint and petition as well as order of taking cognizance and issuance of process as well as Judgment and Order passed by the Learned Sessions Court, this Court would like to refer some relevant provisions for ready reference and assessment first herein below before entering into the merits of this case. Those Sections are read as under:

⁶ 2018 CRI. L. J. 3769

⁷ AIR 2022 SC 147, AIROnline 2021 SC 1120;

⁸ CRR No. 2687 of 2016.

“Section 200- Examination of complainant. —A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses—

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

Section 201- Procedure by Magistrate not competent to take cognizance of the case. —If the complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall,

(a) if the complaint is in writing, return it for presentation to the proper Court with an endorsement to that effect;

(b) if the complaint is not in writing, direct the complainant to the proper Court.

Section 19 of the Criminal Procedure (Amendment) Act, 2005 has been promulgated by the legislature for amending sub-section (1) of Section 202 CrPC which came into force with effect from June 23, 2006. By virtue of the aforesaid amendment, the word “shall”

has been inserted in sub-section (1) of Section 202 Cr.P.C. After the above amendment sub-section (1) of Section 202 Cr.P.C. runs as follows: -

“Section 202- Postponement of issue of process.—

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made, —

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code

on an officer in charge of a police station except the power to arrest without warrant.

Section 203- Dismissal of complaint. —If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

Section 204- Issue of process. — (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be—

(a) a summons-case, he shall issue his summons for the attendance of the accused, or (b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.”

Section 145 of the Negotiable Instruments Act, 1881 reads as under:

“Section 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.”

7. In view of the contention of the parties as well as backdrop of the aforesaid relevant provisions of law, this Court has to decide the following issues: -

(i) Whether the amendment of Section 202 of the Code of Criminal Procedure, 1973 as enacted vide Section 19 of the Criminal Procedure (Amendment) Act, 2005 is mandatory in nature while conducting an enquiry

under Section 202 of the CrPC before issuing process under Section 204 of the CrPC to an accused, who resides beyond the territorial jurisdiction of the Court of the Trial Magistrate?

(ii) Whether Section 202 of the CrPC is applicable in a case of the Court complaint filed under Sections 138 read with Section 142 of the NI Act, 1881 even supported by an affidavit by the Public Servant?

8. It is admitted facts that the petitioner resides beyond the territorial jurisdiction of the Court concerned. There is no dispute with regard to the address. Accordingly, it would be necessary to assert whether the Learned Trial Magistrate should follow the provisions of sub-section (1) of Section 202 of the CrPC and for that this Court relied a judgment placed by the opposite parties passed in **S. S. Binu v. State of West Bengal and another**⁹ where the Division Bench observed in paragraph nos. 61 to 68 as under: -

“61. The term "inquiry" is defined under Sub-Section (g) of Section 2 Cr.P.C which is quoted below: -

⁹ 2018 CRI. L. J. 3769

2.(g) "inquiry" means every inquiry other than trial, conducted under this court by a Magistrate or court."

62. The above provision purports that every inquiry other than a trial conducted by the Magistrate or court is an inquiry under Section 200, Cr.P.C. Examination of complaint only is necessary with the option of examining the witness present, if any, under the inquiry under Section 202, Cr.P.C., the witnesses are examined for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused.

63. In **Chandra Deo Singh Vs. P. C. Bose reported in AIR 1963 SC 1430** a four Judges Bench of the Hon'ble Supreme Court considered Section 202 of the old Criminal Procedure and held as under: -

8. . . . the object of the provisions of Section 202 (corresponding to present Section 202 of the Code), was to enable the Magistrate to form an opinion as to whether process should be issued or not and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath.

64. The Hon'ble Supreme Court while considering the objects underlined the provisions of Section 202 Cr.P.C. in **Manharibhai Muljibhai Kakadia & Anr. (2012**

AIR SCW 5314, para 23) (supra) and made the following observations: -

"20. Section 202 of the Code has twin objects; one, to enable the Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an unnecessary, frivolous or meritless complaint and the other, to find out whether there is some material to support the allegations made in the complaint. The Magistrate has a duty to elicit all facts having regard to the interest of an absent accused person and also to bring to book a person or persons against whom the allegations have been made. To find out the above, the Magistrate himself may hold an inquiry under Section 202 of the Code or direct an investigation to be made by a police officer. The dismissal of the complaint under Section 203 is without doubt a pre-issuance of process stage. The Code does not permit an accused person to intervene in the course of inquiry by the Magistrate under Section 202. The legal position is no more *res integra* in this regard. More than five decades back, this Court in **Vadilal Panchal v. Dattatraya Dulaji Ghadigaonker (AIR 1960 SC 1113)** with reference to Section 202 of the Criminal Procedure Code, 1898 (corresponding to Section 202 of the

present Code) held that the inquiry under Section 202 was for the purpose of ascertaining the truth or falsehood of the complaint, i.e. for ascertaining whether there was evidence in support of the complaint so as to justify the issuance of process and commencement of proceedings against the person concerned.

65. The amended provision of sub-section (1) of Section 202 CrPC came up for consideration of the Hon'ble Supreme Court in the matter of **National Bank of Oman (supra)** and the following observation made in the above decision is hereunder: -

9. The duty of a Magistrate receiving a complaint is set out in Section 202, Cr.PC and there is an obligation on the Magistrate to find out if there is any matter which calls for investigation by a criminal court. The scope of enquiry under this section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. Investigation under Section 202, CrPC is different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The scope of enquiry under Section 202, CrPC is, therefore, limited to the ascertainment of truth or

falsehood of the allegations made in the complaint:

(i) on the materials placed by the complainant before the court;

(ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and

(iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defense that the accused may have.

66. In **Vijay Dhanuka (2014 AIR SCW 2095, paras 13 and 14) (supra)**, it has been held that under Section 200, Cr. P.C, examination of complainant only is necessary with the option of examining the witnesses present, if any, whereas in enquiry under Section 202 Cr. P.C., the witnesses are examined for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused. The relevant portion of the above decision is set out below:

17. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry" has been defined under Section 2(g) of the Code, the same reads as follows: "2. xxx

xxx xxx (g) "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court; xxx xxx xxx". It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or Court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any.

18. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code. In the present case, as we have stated earlier, the Magistrate has examined the complainant on solemn affirmation and the two witnesses and only thereafter he had directed for issuance of process. In view of what we have observed above, we do not find any error in the order impugned. In the result, we do not find any merit in the appeals and the same are dismissed accordingly.

*67. In **Vijay Dhanuka (2014 AIR SCW 2095) (supra)** the aforesaid principle has been repeated and reiterated in the observation that under Section 200, Cr.P.C. the*

examining of complainant only is necessary with the option of examining the witnesses present, if any. Though no specific mode or manner of enquiry is provided under Section 202 Cr.P.C., in an enquiry under Section 202, Cr. P.C., the witnesses are examined for the purpose of deciding whether or not there is sufficient ground of proceeding against the accused. The relevant portion of the above decision is quoted below:

14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry" has been defined under Section 2 (g) of the Code, the same reads as follows:

*2. **(g) 'inquiry'** means every inquiry, other than a trial, conducted under this Code by a Magistrate or court,*

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the

option of examining the witnesses present, if any. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code.

15. In the present case, as we have stated earlier, the Magistrate has examined the complainant on solemn affirmation and the two witnesses and only thereafter he had directed for issuance of process.

68. Therefore, keeping in mind the object sought to be achieved by way of amendment of sub-section (1) of Section 202, Cr.P.C., the nature of enquiry as indicated in Section 19 of the Criminal Procedure (Amendment) Act, 2005, the Magistrate concerned is to ward off false complaints against such persons who reside at far off places with a view to save them for unnecessary harassment and the Learned Magistrate concerned is under obligation to find out if there is any matter which calls for investigation by Criminal Court in the light of the settled principles of law holding an enquiry by way of examining the witnesses produced by the complainant or direct an investigation made by a police officer as discussed hereinabove.”

The Hon’ble Division Bench of this court finally came to conclusion and answered in following manner in paragraph 100 of the aforesaid judgement as under:

I.....

II.....

III.....

IV.....

V. In cases falling under Section 138 read with section 141 of the N.I.Act, the Magistrate is not mandatorily required to comply with the provisions of Section 202 (1) before issuing summons to an accused residing outside the territorial jurisdiction of the Learned Magistrate concerned.”

9. Most of the judgments relied on behalf of the petitioner were meticulously considered by the Hon’ble Supreme Court in the case of ***Sunil Todi and Ors. Vs. State of Gujarat & Anr.***¹⁰ wherein the Hon’ble Supreme Court while deciding the Issue No. 2 i.e. whether the Magistrate, in view of the Section 202, ought to have postponed the issuance of process in a complaint case filed under Section 138 of the NI Act, 1881 had held thoroughly in paragraphs 31 to 40 as under:

“31. The second submission which has been urged on behalf of the appellants turns upon Section 202 CrPC, which is extracted:

¹⁰ ***AIR 2022 SC 47***

“202. Postponement of issue of process.—(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction,] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made, — (a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath: Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of

a police station except the power to arrest without warrant.”

32. Under Sub-Section (1) of Section 202, a Magistrate upon the receipt of a complaint of an offence of which he/she is authorized to take cognizance is empowered to postpone the issuance of process against the accused and either (i) enquire into the case; or (ii) direct an investigation to be made by a police officer or by such other person as he thinks fit. The purpose of postponing the issuance of process for the purposes of an enquiry or an investigation is to determine whether or not there is sufficient ground for proceeding. However, it is mandatory for the Magistrate to do so in a case where the accused is residing at a place beyond the area in which the Magistrate exercises jurisdiction. The accused persons in the present case reside at Aurangabad while the complaint under Section 138 was filed before the Magistrate in Mundra. The argument of the appellants is that in these circumstances, the Magistrate was duty bound to postpone the issuance of process and to either enquire into the case himself or to direct an investigation either by a police officer or by some other person. Section 203 stipulates that if the Magistrate is of the opinion on considering the statement on oath, if any, of the complainant and of the witnesses, and the result of the enquiry or investigation if any under Section 202 that there is no sufficient ground for proceeding, he shall dismiss the complaint recording briefly his reasons for

doing so. The requirement of recording reasons which is specifically incorporated in Section 203 does not find place in Section 202. Section 204 which deals with the issuance of process stipulates that if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, he may issue (a) in a summons case, a summons for attendance of the accused; (b) in a warrant case, a warrant or if he thinks fit a summons for the appearance of the accused. These proceedings have been interpreted in several judgments of this Court. For the purpose of the present case, some of them form the subject matter of the submissions by the appellants and the second respondent.

33. The provisions of Section 202 which mandate the Magistrate, in a case where the accused is residing at a place beyond the area of its jurisdiction, to postpone the issuance of process so as to enquire into the case himself or direct an investigation by police officer or by another person were introduced by Act 25 of 2005 with effect from 23 June 2006. The rationale for the amendment is based on the recognition by Parliament that false complaints are filed against persons residing at far off places as an instrument of harassment. In **Vijay Dhanuka v. Najima Mamtaj [(2014) 14 SCC 638: 2014 AIR SCW 2095]**, this Court dwelt on the purpose of the amendment to Section 202, observing:

“11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process ‘in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction’ and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

12. The words ‘and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction’ were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far-off places in order to harass them. The note for the amendment reads as follows:

‘False complaints are filed against persons residing at far-off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction, he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.’ The use of the expression “shall” prima facie makes the inquiry or the investigation, as

the case may be, by the Magistrate mandatory. The word “shall” is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word “shall” in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression “shall” and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.”

34. This Court has held that the Magistrate is duty bound to apply his mind to the allegations in the complaint together with the statements which are recorded in the enquiry while determining whether there is a *prima facie* sufficient ground for proceeding. In **Mehmood UI Rehman v. Khazir Mohammad Tunda** [(2015) 12 SCC 420: (AIR 2015 SC 2195)], this Court followed the dictum in **Pepsi Foods Ltd. v. Special Judicial Magistrate** [(1998) 5 SCC 749: (AIR 1998 SC 128)] and observed that setting the criminal law in motion against a person is a serious matter. Hence, there must be an application of mind by the Magistrate to whether the allegations in the complaint together with the statements recorded or the enquiry

conducted constitute a violation of law. The Court observed:

“20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course. As held by this Court in **Pepsi Foods Ltd. v. Judicial Magistrate [Pepsi Foods Ltd. v. Judicial Magistrate, (1998) 5 SCC 749: 1998 SCC (Cri) 1400]** to set in motion the process of criminal law against a person is a serious matter.”

“22. The steps taken by the Magistrate under Section 190(1)(a) CrPC followed by Section 204 CrPC should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, *prima facie*, make the accused answerable before the court. No doubt, no formal order or a speaking order is required to be

passed at that stage. The Code of Criminal Procedure requires speaking order to be passed under Section 203 CrPC when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 CrPC, the High Court under Section 482 CrPC is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before the criminal court as an accused is serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment.”

*These decisions were cited with approval in **Abhijit Pawar v. Hemant Madhukar Nimbalkar (2017) 3 SCC 528: AIR 2017 SC 299**. After referring to the purpose underlying the amendment of Section 202, the Court observed:*

“25. ... the amended provision casts an obligation on the Magistrate to apply his mind carefully and satisfy himself that the allegations in the complaint, when considered along with the statements recorded or the enquiry conducted thereon, would *prima facie* constitute the offence for which the complaint is filed. This requirement is emphasised by this Court in a recent judgment **Mehmood Ul Rehman v. Khazir Mohammad Tunda** [**Mehmood Ul Rehman v. Khazir Mohammad Tunda, (2015) 12 SCC 420: AIR 2015 SC 2195: (2016) 1 SCC (Cri) 124**]...”

35. While noting that the requirement of conducting an enquiry or directing an investigation before issuing process is not an empty formality, the Court relied on the decision in **Vijay Dhanuka** which had held that the exercise by the Magistrate for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused is nothing but an enquiry envisaged under Section 202 of the Code.

36. In **Birla Corporation Ltd. v. Adventz Investments and Holdings** [(2019) 16 SCC 610: AIR 2019 SC 2390], the earlier decisions which have been referred to above were cited in the course of the judgment. The Court noted:

“26. The scope of enquiry under this section is extremely restricted only to finding out the truth or otherwise of the allegations made in the

complaint in order to determine whether process should be issued or not under Section 204 CrPC or whether the complaint should be dismissed by resorting to Section 203 CrPC on the footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any. At the stage of enquiry under Section 202 CrPC, the Magistrate is only concerned with the allegations made in the complaint or the evidence in support of the averments in the complaint to satisfy himself that there is sufficient ground for proceeding against the accused.”

Hence, the Court held:

*“33. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The application of mind has to be indicated by disclosure of mind on the satisfaction. Considering the duties on the part of the Magistrate for issuance of summons to the accused in a complaint case and that there must be sufficient indication as to the application of mind and observing that the Magistrate is not to act as a post office in taking cognizance of the complaint, in **Mehmood Ul Rehman [Mehmood Ul Rehman v. Khazir Mohammad Tunda, (2015) 12 SCC 420: (2016) 1 SCC (Cri) 124]...**”*

*The above principles have been reiterated in the judgment in **Krishna Lal Chawla v. State of U.P [(2021) 5 SCC 435: AIR 2021 SC 1381]**.*

37. In this backdrop, it becomes necessary now to advert to an order dated **16 April 2021** of a Constitution Bench in **Re: Expeditious Trial of Cases**

under Section 138 of N.I. Act 1881 [Suo Motu Writ Petition (Cri) No. 2 of 2020, decided on 16 April 2021 (Reported in AIR 2021 SC 1957)]. The Constitution Bench notes “the gargantuan pendency of complaints filed under Section 138” and the fact that the “situation has not improved as courts continue to struggle with the humongous pendency”. The court noted that there were seven major issues which arose from the responses filed by the State Governments and the Union Territories including in relation to the applicability of Section 202 of the CrPC. Section 143 of the NI Act provides that Sections 262 to 265 of the CrPC (forming a part of Chapter XXI dealing with summary trials) shall apply to all trials for offences punishable under Section 138 of the NI Act. On the scope of the inquiry under Section 202 CrPC in cases under Section 138 of the NI Act, there was a divergence of view between the High Courts. Some High Courts had held that it was mandatory for the Magistrate to conduct an inquiry under Section 202 CrPC before issuing process in complaints filed under Section 138, while there were contrary views in the other High Courts. In that context, the Court observed:

“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 Mamta & Ors. 1, Abhijit Pawar v. Hemant Madhukar Nimbalkar and Anr. and Birla Corporation Limited v. Adventz Investments and Holdings Limited & Ors.)**. There has been a divergence of opinion amongst the High Court's 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 Court's 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. (AIR 2016 SC 2149)**, 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.”

38. 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.

39. In the present case, the Magistrate has adverted to:

- (i) The complaint;
- (ii) The affidavit filed by the complainant;
- (iii) The evidence as per evidence list and; and
- (iv) The submissions of the complainant.

40. The order passed by the Magistrate cannot be held to be invalid as betraying a non-application of mind. In **Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal [(2003) 4 SCC 139: AIR 2003 SC 1900]**, this Court has held that in determining the question as to whether process is to be issued, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can only be determined at the trial.

[See also in this context the decision in **Bhushan Kumar v. State (NCT of Delhi) (2012) 5 SCC 424: AIR 2012 SC 1747**.”

10. Over all consideration of the arguments made by the parties and judgments referred above by the parties and upon perusal of all orders passed by the Learned Metropolitan Magistrate, this Court finds that the Learned Chief Metropolitan Magistrate has carefully perused the complaint supported by an affidavit and documents,

taken cognizance and further transferred the case to Learned Metropolitan Magistrate, 16th Court for enquiry and disposal under Section 192 (1) CrPC.

11. On 13.03.2006, the complainant was examined by the Learned Metropolitan Magistrate under Section 200 of the CrPC and adverted to:

- (a) The complaint;
- (b) The affidavit filed by the complainant;
- (c) The original documents in support of the complaint;
- (d) The submissions of the Ld. advocate for the complainant.

And finally satisfied that there are sufficient grounds for proceeding against the accused person under Section 138 read with Section 142 of the N.I. Act, 1881 and issued summon to the accused person. Moreover, accused person appeared through his learned Advocates. On 12.09.2019, a plea under Section 251 of the Code of Criminal Procedure was taken and the matter was fixed for evidence. The complainant was examined on 04.12.2019 and 20.01.2021 and the matter was fixed for cross-examination. Thereafter, at the stage of cross-examination, the accused person filed petition after more than a year on 05.04.2022 for examination under Section 202 of the CrPC.

In addition, it is admitted fact that the complaint has been filed by a Public Servant of West Bengal Essential Commodities Supply Corporation Ltd., a Government of West Bengal Undertaking Company. The complainant was acting or purporting to act in discharge of his official duties. Therefore, the Impugned Order dated 20.05.2022 passed by the Learned Metropolitan Magistrate cannot be held to be invalid or incorrect. This Court does not find any infirmity far less any jurisdictional error in the Order impugned. The judgment delivered in the cases of **S.S. Binu V. State of West Bengal and another** reported in **2018 Crl.L.J 3769** and **Sunil Todi and Ors. Vs. State of Gujarat & Anr.** reported in **AIR 2022 SC 47** are squarely applicable in the present facts and circumstances of the instant case. Hence, this Court endorsed the concurrent findings of both the Learned Trial Court and Learned Sessions Judge.

12. Accordingly, **C.R.R. 3849 of 2022** is, thus, **dismissed**.

Connected applications, if any, are also, thus, disposed of.

13. Case Diary, if any, is to be returned to the learned Counsel for the State.

14. Interim order, if any, stands vacated.

15. Let a copy of this judgment be sent to the learned Court below for information.

16. Parties will act on the server copies of this judgment uploaded on the official website of this Court.

17. Urgent photostat certified copy of this judgment, if applied for, is to be given as expeditiously to the parties on compliance of all legal formalities.

(Ajay Kumar Gupta, J)

P. Adak (P.A.)