**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

924 CRIMINAL WRIT PETITION NO. 1669 OF 2022

GULAM TAHER GULAM MUSTAFA
VERSUS
ABDUL MUKHTAR ABDUL GAFFAR
...
Advocate for the Petitioner : Mr. Z. H. Farooqui,
and Mr. A.N. Siddiqui
Advocate for Respondent : Mr. N. S. Muthiyan
…

CORAM : Y. G. KHOBRAGADE, J.

DATE : 26.11.2024

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of both the sides, the Petition is heard finally.

2. Heard Mr. Z. H. Farooqui, the learned counsel for the Petitioner and Mr. N. S. Muthiyan, the learned counsel for the Respondent.

3. Having regard to the submissions canvassed on behalf of both sides, I have gone through the record.

4. In the present Petition, under Articles 226 and 227 read with Section 482 of the Code of Criminal Procedure,1973, the Petitioner challenges the order dated 11.10.2022 passed by the learned Additional

Sessions Judge, Aurangabad below Exhibit 9 in Criminal Revision Application No. 174/2022 thereby confirmed the order dated 03.03.2021 passed by the learned Judicial Magistrate First Class, Aurangabad in SCC No.4231/2018.

5. The Petitioner is the original accused and the Respondent is the original complainant in complainant bearing SCC No. 4231/2018 instituted for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. (for short N. I. Act).

6. The Respondent/complainant filed a complaint under Section 138 of N.I. Act alleging that the Petitioner / accused No. 1 was in need of money for his business and time to time he has provided hand loan to the accused. The details of payment is described in paragraph No.1 of the complaint. For repayment of said hand loan, accused No.1 issued a cheque bearing No. 000021 for an amount of Rs. 50,000/- and another cheque bearing No. 000019 for an amount of Rs. 4,80,000/- both drawn on HDFC Bank. On 31.10.2016, the present Petitioner / accused No.1 intimated on phone call that because of his illness he suffered loss in his business and an amount of Rs. 5,30,000/- would be paid in two months. After expiry of said period of two months from

31.10.2016, the Respondent / complainant had approached accused No.1, but he was not in a position to pay the same. But accused No. 1 assured about making the payment once the plot is sold. Accordingly, on 19.12.2017, the complainant received information from the accused No.1 about selling of plot. Thereafter said two cheques were taken back by accused No.1 and fresh two cheques for an amount of Rs. 2,40,000/- each drawn on Punjab National Bank, Aurangpura Branch, Aurangabad were issued in favour of the complainant. Out of which, one cheque was bearer cheque and same was encashed. However, another cheque which was issued on account payee bearing No. 168775 was presented for encashment on 20.03.2018, but said cheque was dishonoured for reason 'INSTP STALE' and return memo dtd. 20.03.2018 was issued by HDFC Bank. Accordingly on 10.04.2018, the Respondent / complainant issued mandatory notice which was served upon the Petitioner / accused on 16.04.2018. However, the present Petitioner / accused did not comply with the said notice. No doubt, on 18.06.2018, learned Magistrate passed an order below Exhibit 1 and placed the matter for verification. However, again on the same day, the second order came to be passed directing the complainant to argue the matter on the maintainability of complaint. On 26.07.2018, the learned Judicial Magistrate passed an order below Exhibit 6 and directed an inquiry under Section 202 of the Code of Criminal Procedure on the ground that as per the return memo, the instrument was returned on account of Instrument Stale. No doubt, Shri Jaideep Dattatraya Bankar, Branch Manager of HDFC Bank examined at Exhibit 12, has deposed that the instrument in question was referred for clearance to the concerned bank and the cheque return memo was received from Punjab National Bank. Therefore, the authorized person of said bank would say about the instrument, whether it is stale or not. Thereafter, on 03.03.2021, the learned Judicial Magistrate has passed an order holding that the cheque bearing No. 168775 was issued by Respondent No. 2 for payment of loan obtained by accused No.1. The signature of accused No. 2 appearing on the said cheque. Therefore, only the drawer of the cheque would be prosecuted. The learned Magistrate further observed that on perusal of the complaint, document as well as the affidavit filed by the complainant, it shows that all the essential ingredients of offence punishable under Section 138 of the N.I. Act, prima facie made out against accused No. 2. Therefore, issue process was ordered against the accused considering the guidelines framed by the Hon'ble Supreme Court in the case of ***Indian Bank Association and others Vs. Union of India and others, AIR 2014 Supreme Court 2528.*** Needless to say that the Petitioner / accused No.2 had approached before the Revisional

Court under Section 397 of Cr.P.C. and had challenged the order of issuance of process. However, on 11.10.2022, the learned Sessions Judge passed the impugned order and dismissed the revision, considering the ratio laid down in case of Indian Bank Association and others vs. Union of India (*cited supra*).

7. The learned counsel appearing for the Petitioner canvassed that on 18.06.2018, initially, the learned Magistrate passed the order below Exhibit 1 and put the matter for verification, but on the same day again the complainant was called upon to argue the matter on ground of maintainability of the complaint. Thereafter, the inquiry was conducted under Section 202 of the Cr.P.C. by examining the witness Branch Manager of HDFC Bank. However, from the evidence of the said witness it does not appear that the instrument was stale or not and the complainant has not examined the Branch Manager of Punjab National Bank in which the cheque was drawn. So also, while passing the order dated 03.03.2021, the learned trial Court failed to appreciate that the complainant has not made out the prima facie case and sufficient grounds for issuance of process. Unless the learned Magistrate satisfied himself about existence of sufficient ground to proceed with the complaint, the process could not have been issued. Therefore, the order of issuance of process is itself illegal and bad in law. However, the

learned revisional Court failed to consider the same, hence, prayed for quash and set aside the impugned orders.

8. In support of his submissions, the learned counsel appearing for the Petitioner placed reliance on the case of ***Mehmood Ul Rehman Vs. Khazir Mohammad Tunda and others (2015) 12 SCC 420,*** wherein the Hon'ble Supreme Court has observed in paragraph Nos. 20 to 23 as under :

> *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 Limited 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.*
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> *21. Under Section 190(1)(b) of CrPC, the Magistrate has the advantage of a police report and under Section 190(1)(c) of CrPC, he has the information or knowledge of commission of an offence. But under Section 190(1)(a) CrPC, he has only a complaint before him. The Code hence specifies that "a complaint of facts which constitute such offence". Therefore, if*

the complaint, on the face of it, does not disclose the commission of any offence, the Magistrate shall not take cognizance under Section 190(1)(a) CrPC. The complaint is simply to be rejected.

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 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.*

23. Having gone through the order passed by the Magistrate, we are satisfied that there is no indication on the application of mind by the learned Magistrate in taking cognizance and issuing process to the appellants. The contention that the application of mind has to be inferred cannot be appreciated. The further contention that without application of mind, the process will not be issued cannot also be appreciated. Though no formal or speaking or reasoned orders are required at the stage of Section 190/204 CrPC, there must be sufficient indication on the application of mind by the Magistrate to the facts constituting commission of an offence and the statements recorded under Section 200 CrPC so as to proceed against the offender. No doubt, the High Court is right in holding that the veracity of the allegations is a question of evidence. The question is not about veracity of the allegations; but whether the respondents are answerable at all before the criminal court. There is no indication in that regard in the order passed by the learned Magistrate."

9. He further relied on the case of ***Amresh Kumar Dhiraj and Others Versus State of Jharkhand and another, 2019 SCC online Jhar 2775***,

wherein it has been held as under,

> *"**25.** The order taking cognizance under Section 190 Cr.P.C. and order issuing process under Section 204 Cr.P.C., can very well a composite order but as observed, the application of mind would be different in both cases. This application of mind must be reflected in the order itself. The order should not be mechanical. Magistrate has to mention at least that there are sufficient materials to proceed against the persons and what are the prima-facie materials to proceed against them. He need not pass a detail judgment evaluating the materials, which are before him. The detail reasons as to why he is taking cognizance or issuing process are not to be mentioned but at least what are the bare minimum prima-facie materials against the accused-petitioners should be mentioned in the order issuing summons and prima facie what offence is alleged, in the order taking cognizance.*
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> ***26.** Applying the aforesaid principle, while going through this impugned order, I find that though the Magistrate has mention that there are statements of the witnesses, but what are the prima-facie materials to proceed against these petitioners and others have not been whispered. In a most mechanical manner, in one line, this impugned order has been passed summoning the accused. The Hon'ble Supreme Court in the case of "S.M.S. Pharmaceuticals Ltd." and "Ramdev Food Products Private Limited" (Supra) has held that summoning an accused is a very serious matter and has got far reaching implications on the person who has been summoned.*

10. Per contra, the learned counsel appearing for the Respondent supported the findings recorded by both the Courts below and submits

that while passing the order dated 03.03.2021, the learned Judicial Magistrate First Class considered the transactions between the Petitioner / accused and the Respondent / complainant as well as issuance of the instrument in question for repayment of hand loan. The learned trial Court also considered that the cheque signed by the accused No. 2, therefore, only drawer of the cheque can be prosecuted and declined to issue process as against the accused No.1 who is the son of accused No. 2 and said fact was considered by the learned revisional Court. Therefore, the concurrent findings recorded by both the Courts below need no interference by this Court. Therefore, it prima facie shows that the learned trial Court complied with the provisions of Section 204 and issued process as against the present Petitioner and no interference is called out at the hands of this Court. Hence prayed to dismiss the Petition.

11. Needless to say that, the Respondent /complainant specifically made averments in his complaint about issuance of mandatory notice on 10.04.2018 and served upon the present Petitioner / accused on 16.04.2018. However, the Petitioner / accused did not comply with the said notice. As per the provisions of Section 138 of the N.I. Act, the mandatory notice is required to be issued with an intention to give a proper and sufficient opportunity to the drawee of the cheque.

However, in the case in hand, after going through the impugned judgment, it appears that though the present Petitioner / accused served with the mandatory notice, but he never replied the said notice and not raised any specific defence. The issue, whether the instrument in question was stale cannot be decided at this juncture in absence of substantial evidence.

12. It shows that the learned revisional Court considered the case of the ***Indian Bank Association and others Vs. Union of India and others, AIR 14 SC 2528*** and the case of ***Dr. Abdul Gaffar Quadri s/o Abdul Razzak Vs. State of Maharashtra and another*** in Criminal Application No. 2883 of 2013 and 2884 of 2013 and held that the trial Court issued the process after compliance of the mandatory provisions of law contemplated under Section 202 as well as 204 of Cr.P.C. and dismissed the revision which does not appear to be illegal and bad in law and no substantial grounds are set out to interfere with the said matter.

13. Hence, the present Petition is dismissed.

14. Rule is discharged.

(Y. G. KHOBRAGADE, J.)

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