



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION  
CRIMINAL APPLICATION NO.1202 OF 2019**

M/s. Smita Diamonds and Anr. ... Applicants  
versus  
State of Maharashtra and Anr. ... Respondent

Mr. Karansingh Rajput with Mr. Fauzan for Applicants.  
Mr. M.G.Patil, APP for State.  
Mr. Niranjana Mundargi i/by Mr. Keral Mehta, for Respondent No.2.

**CORAM: N.J.JAMADAR, J.**

**RESERVED ON : 30 JANUARY 2024  
PRONOUNCED ON : 9 MAY 2024**

**P.C.**

1. By this application under Section 482 of the Code of Criminal Procedure, 1973, the applicants take exception to the order dated 29 July 2019 passed by the learned Additional Sessions Judge in Criminal Revision Application No.220 of 2019 whereby the revision application preferred by the applicants came to be dismissed, affirming the order of issue of process dated 14 January 2019 passed by the learned Metropolitan Magistrate, 71<sup>st</sup> Court, Bandra, Mumbai in Complaint No.141 of 2018 lodged by the Respondent No.2 – complainant for an offence punishable under Section 420 of the Indian Penal Code.

2. The background facts can be stated, in brief, as under :

2.1 Mr. Pranav Doshi – applicant No.2 is the proprietor of M/s. Smita Diamonds – applicant No.1. M/s. H. Deepak and Co., (the complainant) is a

registered partnership firm. Mr. Rakesh Polishwala is the partner of the complainant's firm. The complainant deals in the business of diamonds.

2.2 The accused had placed orders for purchase of cut and polished diamond with the complainant. On the basis of the representations of the accused, the complainant was induced to sell diamonds worth Rs.80,96,669/- under Invoice No.HPR918 dated 26 September 2017. In accordance with the terms of the contract, the accused had agreed to pay price of the diamonds sold and delivered, within 120 days.

2.3 The complainant alleged, the term of credit of 120 days expired on 25 January 2018. Despite repeated demands, the accused No.2 initially avoided to make the payment on one or the other pretext and later on, stopped responding to the calls of the complainant. It transpired that the accused had duped many a persons in similar fashion. The complainant, thus, approached BKC police Station to lodge report. As the police declined to register the FIR, purportedly on the ground that the dispute was of civil nature, the complainant lodged a private complaint No.SW/141/2018.

2.4 The learned Magistrate recorded the verification statement of the complainant, and finding that a prima facie case for an offence punishable under Section 420 of the IPC, issued process against the accused.

2.5 Being aggrieved, the accused carried the matter in revision before the

learned Sessions Judge in Criminal Revision Application No.220 of 2019. By the impugned order, the learned Additional Sessions Judge dismissed the revision application, holding that the learned Magistrate had not committed any error in issuing process against the accused for an offence punishable under Section 420 of IPC.

2.6 Being further aggrieved, the accused – applicants have preferred this application.

3. I have heard Mr. Karansingh Rajput, learned Counsel for the Applicant, Mr. M.G.Patil, learned APP for the State and Mr. Niranjana Mundargi, learned Counsel for the Respondent No.2 – complainant, at some length. Learned Counsel took the Court through the material on record.

4. Mr. Rajput mounted a three pronged challenge to the order of issue of process. Firstly, the learned Magistrate did not keep in view the distinction between the offence of cheating and failure to perform a promise. Secondly, there was a gross procedural defect in the proceedings before the learned Magistrate as the accused being the resident of an area beyond the local limits of the jurisdiction of the learned Metropolitan Magistrate at Bandra, it was incumbent upon the learned Magistrate to conduct an inquiry as envisaged by Section 202(1) of the Code of Criminal Procedure, 1973. Thirdly, in any event, the learned Magistrate was enjoined to examine all the witnesses of the complainant before the process came to be issued under Section 202

of the Code.

5. Mr. Mundargi, learned Counsel for Respondent No.2 submitted that none of the grounds sought to be urged on behalf of the accused deserve any consideration. It was submitted that the learned Magistrate after following the procedure prescribed under the Code and satisfying himself about the prima facie case having been made out, has issued the process. In exercise of inherent jurisdiction, this Court may not delve into the facts as the Court of first instance would do. Mr. Mundargi further urged, there is material on record to indicate that the intention of the applicant was dishonest since the inception of the transaction. A patently false contention of the diamonds sold and delivered by the complainant company were of substandard quality was raised after the expiry of the term of credit. Having regard to the allegations that the applicant had duped other persons in similar fashion, the learned Magistrate committed no error in issuing the process.

6. On the aspect of the inquiry envisaged by Section 202 (1), post amendment by Act No.20 of 2005, Mr. Mundargi would urge that the said provision would not be attracted in the facts of the case as the applicants/accused cannot be said to be residents of an area beyond the local limits of the jurisdiction of the learned Magistrate. Inviting attention of the Court to the provisions contained in Section 16 of the Code, Mr. Mundargi would urge that the jurisdictional powers of every Metropolitan Magistrates extend throughout metropolitan area.

7. Thirdly, according to Mr. Mundargi, the submission that even when the Magistrate proceeds to take cognizance of the offence under Section 200 of the Code and does not consider it appropriate to postpone the issue of process, he is still enjoined to record the statement of the witness of the complainant's, if any, is fallacious.

8. On the first count of the allegations in the complaint making out a prima facie case for an offence punishable under Section 420 of IPC, it would be necessary to note that to constitute an offence of cheating, the intention of the accused must be dishonest since the inception of the transaction. There is indeed distinction between the cheating and failure to perform a promise. A mere breach of contract is not in itself a criminal offence. Failure to perform a promise furnishes a cause for enforcing civil liability. However, as enunciated by the Supreme Court in the case of **Hridaya Ranjan Prasad Verma and Ors. V/s. State of Bihar and Anr.**<sup>1</sup> the distinction between mere breach of contract and the offence of cheating, which is criminal offence, is a fine one. While the breach of contract cannot give rise to criminal prosecution for cheating, fraudulent or dishonest intention is the basis for the offence of cheating. It is also well recognized that same set of facts may make out a civil wrong as also a criminal offence and the mere fact that a civil remedy is available to the complainant cannot by itself be a ground to quash criminal proceedings.

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1 (2000) 4 SCC 168

9. A useful reference in this context can be made to the decision of the Supreme Court in the case of Vesa Holdings Pvt. Ltd. And Anr. V/s. State of Kerala and Ors.<sup>2</sup> wherein the following observations were made :

“13. It is true that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may be available to the complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose the criminal offence of cheating or not. In the present case there is nothing to show that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC. In our view, the complaint does not disclose any criminal offence at all. The criminal proceedings should not be encouraged when it is found to be mala fide or otherwise an abuse of the process of the Court. The superior courts while exercising this power should also strive to serve the ends of justice. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of the court and the High Court committed an error in refusing to exercise the power under Section 482 of the Criminal Procedure Code to quash the proceedings.”

10. On the aforesaid touchstone, reverting to the facts of the case, there is material to indicate that the intention of the applicants might have been dishonest since the inception of the transaction. As noted above, there is no material to indicate that the alleged defence of sub-standard quality of diamonds which were sold and delivered to the applicant by the accused was raised till the expiry of credit period. Nor there is material to show that while raising the ground of sub-standard quality of

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2 (2015) 8 SCC 293

the diamonds, the accused professed to return those diamonds to the complainant. Secondly, the courts have noted that there were allegations against the applicants that they had duped other buyers in the market in a similar fashion. In this view of the matter, the learned Magistrate cannot be said to have committed any error in arriving at a finding that a prima facie case for the offence punishable under Section 420 was made out.

11. The thrust of the submission of procedural irregularity vitiating the order of issue of process, was based on the legislative change brought about by the Act of 2005 in Section 202 of the Penal Code. Sub-Section (1) and (2) of Section 202 of the Code read as under :

“202. Postponement of issue of process – (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized 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.”

12. The phraseology of Section 202(1), especially the use of the word ‘shall’ makes it obligatory for a Magistrate to postpone the issue of process against the accused where the accused is residing at a place beyond the area in which a Magistrate exercises his jurisdiction and either inquire into the case himself or direct an investigation to be made by police officer or such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding.

13. Mr. Rajput placed a strong reliance on the decision of the Supreme Court in the case of Vijay Dhanuka and Ors. V/s. Najima Mamtaj and Ors.<sup>3</sup> wherein the Supreme Court in the context of the 2005 Amendment, considered the question whether it would be mandatory to hold an inquiry or investigation as a Magistrate thinks fit, where the accused is residing at a place beyond the area in which a Magistrate exercises his jurisdiction. After advertent to the note for the amendment, the Supreme court declared that the said provision is of mandatory nature. It was, inter alia, observed as under :

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<sup>3</sup> (2014) 14 SCC 638

“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” was inserted by Section 19 of Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23rd of June, 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.”

14. The aforesaid pronouncement was followed by the Supreme Court in the

case of **Abhijit Pawar V/s. Hemant Madhukar Nimbalkar and Anr.**<sup>4</sup> wherein it was

enunciated as under :

26. The requirement of conducting enquiry or directing investigation before issuing process is, therefore, not an empty formality. What kind of 'enquiry' is needed under this provision has also been explained in Vijay Dhanuka (supra) case, which is reproduced hereunder:

*“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. There can be no quarrel with the proposition that the Magistrate is statutorily enjoined to postpone the issue of process against the accused in a case where the accused is residing at a place beyond the local limits of his jurisdiction and either inquire into the case himself or direct an investigation before issuing the

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4 (2017) 3 SCC 528

process. The mandatory character of the amendment brought about by the Act of 20 of 2005 has been reiterated by a number of decisions. However, the question that warrants consideration in this case is, whether the provisions contained in Section 202(1) were attracted ?

16. Evidently, the cognizance was taken and process was issued by the Metropolitan Magistrate at Bandra. The applicants/accused are the residents of Prabhadevi. Even if the Court proceeds on the premise that the address of the accused is beyond the territorial limits of the jurisdiction of the Bandra Police Station, yet in view of the provisions contained in Section 16(3) of the Code, jurisdiction and powers of every Metropolitan Magistrate extend through out the metropolitan area. Since the applicants-accused were admittedly residing within the metropolitan area, the fact that the applicants were residing in an area beyond the local limits of the concerned police station, does not warrant application of the provisions contained in Section 202(1) of the Code.

17. The matter can be be looked at from another angle. If the Metropolitan Magistrate is considered to exercise jurisdiction within the limits of a particular police station having regard to the density of population and the congested living spaces in the metropolitan area, in every case, the question whether residence of an accused falls within the local limits of the concerned police station may warrant adjudication. In the face of the provisions contained in Section 16(3) of the Code, such narrow

construction, as was sought to be canvassed on behalf of the applicants regarding the jurisdiction of the Metropolitan Magistrate, does not merit acceptance.

18. On the third ground of the necessity of the examination of the witnesses of the complainant, Mr. Rajput would urge that Vijay Dhanuka (supra) is also an authority for the proposition that where a Magistrate conducts an inquiry under Section 202 of the Code, it is mandatory for him to examine the witnesses for the complainant.

19. In the case of Vijay Dhanuka (supra), the Supreme Court considered the question, albeit in the facts of the case, as to whether a Magistrate therein had held an inquiry as mandated under Section 202 of the Code, before issuing summons. The question was answered as under :

“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 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.”

20. Mr. Rajput submitted that the aforesaid decision in the case of Vijay Dhanuka (supra), has been followed with approval in the case of Dilip Kumar V/s. Brajraj Shrivastava and Anr.<sup>5</sup> In the case of Dilip Kumar (supra), the learned Magistrate had passed an order to hold an inquiry under sub-section (1) of Section 202 of the Code. The learned Magistrate proceeded to record the statement of the complainant, and, thereafter, dismissed the complaint under Section 202 of the Code. A question arose as to whether it was incumbent upon a Magistrate to record the statements of other witnesses before a complaint could be dismissed under Section 203. In that context, the Supreme Court observed, inter alia, as under :

“4. We have carefully perused the order dated 18<sup>th</sup> September, 2008 passed by the learned Magistrate and earlier order of 22nd August, 2008. Under sub-Section (1) of Section 202 of the Cr.P.C., the learned Magistrate has a discretion either to inquire into the case himself, or to direct a Police Officer to investigate and submit a report. In this case, he took recourse to the first option. A perusal of the complaint shows that eight witnesses were specifically named in the complaint. The learned Magistrate did not examine any of them. In the order dated 18th September, 2008, the learned Magistrate has not recorded reasons for not recording the statements of other witnesses specifically cited in the complaint. The law is

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5 2023 SCC Online SC 916

well settled, which is found to have been reiterated in the decision in the case of Mohinder Singh (supra). After taking recourse to sub-Section (1) of Section 202 of the Cr.P.C., before dismissing a complaint by taking recourse to Section 203 of the Cr.P.C., the learned Magistrate has to consider the statements of the complainant and his witnesses. In this case, the learned Magistrate has not examined the other witnesses. The view taken by this Court in the case of Nagawwa (supra) is no different.”

21. The aforesaid pronouncement does not advance the cause of the applicants. In fact, the stage for attracting the provisions contained in Section 202 of the Code, did not arise in the instant case. The learned Magistrate proceeded to record verification statement of the complainant and ordered the issue of process while the consideration was at the stage envisaged by Section 200 of the Code. As the applicants were residing within the limits of the jurisdiction of the Metropolitan Magistrate, recourse to Section 202 by virtue of the amendment introduced by the Act of 20 of 2005 was not warranted. Nor the learned Magistrate postponed the issue of process otherwise.

22. The decision in the case of Dilip Kumar (Supra), deals with a converse situation. In that case, after ordering the postponement of the issue of process, the Learned Magistrate had examined the complaint only and did not examine the other witnesses, though cited by the complainant. Therefore, the said decision has no application to the facts of the case, even remotely.

23. The conspectus of aforesaid consideration is that none of the grounds

sought to be urged on behalf of the applicants furnish a cause for interfering with the impugned order as well as the order passed by the learned Magistrate.

24. The application, therefore, deserves to be rejected.

25. Hence, the following order :

**ORDER**

(i) The Application stands rejected.

(ii) No order as to costs.

**( N.J.JAMADAR, J. )**