



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPLICATION (APL) NO.349 OF 2024

Pramod Arjunrao Sathe
Age: 52 years, Occ: Business,
R/o Amit Apartment, 1093 Model Colony,
Near BSNL office, Shivaji Nagar,
Pune, District Pune

...APPLICANT

...V E R S U S...

Sanjay Stone Crusher
Through its Proprietor
Mr. Sanjay Chitarmal Agrawal,
Age : 50 years, Occ: Business,
R/o Kholeshwar, Near Kholeshwar
Mandir, Taluka & Dist. Akola.

...NON-APPLICANT

Shri J.B. Gandhi, Advocate for applicant.
Shri N.J. Patil, Advocate for non-applicant.

CORAM:- M.W. CHANDWANI, J.
DATED : 30.04.2024

ORAL JUDGMENT:

. Heard.

2. **Admit.**

3. The application challenges the order dated 10.10.2022 passed by the learned Judicial Magistrate First Class, Akola in Summary Criminal Case No.2628 of 2022, thereby issuing process against the applicant and other co-accused.

4. Bare facts for disposal of the application can be culled out as under:

The non-applicant filed a complaint for the offence punishable under Section 138 of the Negotiable Instruments Act (for short 'N.I. Act') against Sri Sathe Infracon Pvt. Ltd. (for short 'the Company') and other co-accused including the present applicant alleging that for clearing outstanding payment of the company, the applicant being Managing Director of the Company issued a cheque dated 17.02.2022 for Rs.20,00,000/- bearing no.000019 drawn on HDFC Bank Ltd. Shivaji Nagar Branch, Pune. However, the cheque came to be dishonoured for insufficient funds. The non-applicant issued a statutory notice under Section 138 of the N.I. Act to the Company as well as other Directors including the applicant. Despite expiry of statutory period, neither of them paid the cheque amount to the non-applicant. Therefore, the aforesaid complaint came to be filed against the Company and other co-accused including the present applicant. By the impugned order, process came to be issued by the learned Magistrate against the Company and the applicant. Feeling aggrieved by the said impugned order, the applicant filed revision before the learned

Additional Sessions Judge, Akola which came to be rejected. Hence, the present application is filed mainly on the ground that the enquiry under Section 202 of the Code of Criminal Procedure (for short, 'Cr.P.C.') has not been conducted.

5. Mr. J.B. Gandhi, learned counsel for the applicant vehemently submitted that after amendment in Section 202 of the Cr.P.C. and in the wake of authoritative pronouncement of the Hon'ble Supreme Court as well as of this Court, the enquiry under Section 202 is mandatory if the accused against whom complaint is filed resides beyond the jurisdiction of the learned Magistrate before whom the complaint is filed. In the present case, the applicant is residing at Pune, whereas the complaint has been filed before the learned Magistrate at Akola. Thus, the applicant resides outside the territorial jurisdiction of the learned Magistrate, Akola, therefore, it was necessary for him to conduct enquiry under Section 202 of the Cr.P.C. The learned Magistrate passed an order for enquiry under Section 202 of the Cr.P.C. without referring the matter to the concerned police station and without waiting for the report of the enquiry by the police under Section 202, passed the impugned order.

6. Learned counsel for the applicant took me to the Roznama dated 08.09.2022. According to him, Roznama reflects that the case was pending for report of enquiry under Section 202 of the Cr.P.C. but there is no enquiry report by the police station in the present case and on the subsequent date the impugned order came to be passed without referring the report of the enquiry. Therefore, according to him, the impugned order does not sustain in wake of the pronouncement of the Hon'ble Supreme Court in the case of *Vijay Dhanuka and others Vs. Najima Mamtaj and others* ¹ and *Birla Corporation Limited vs. Adventz Investments and Holdings Limited and others* ².

7. Lastly, Mr. Gandhi submitted that even if the enquiry is conducted by the Magistrate but as contemplated under Section 202 of the Cr.P.C. the Magistrate did not examine the witnesses and merely on the affidavit of the complainant has passed the impugned order. According to him, even on this count the impugned order does not sustain and is required to be set aside.

8. *Per contra*, Mr. N.J. Patil, learned counsel for the non-applicant/complainant submitted that under Section 202 of

¹ (2014) 14 SCC 638

² (2019) 16 SCC 610

Cr.P.C. the learned Magistrate has two options, either to send the matter to the police for conducting enquiry or the learned Magistrate may himself conduct the enquiry. In the present case, there is no such order for sending the matter to the police for conducting enquiry under Section 202 of the Cr.P.C. and the learned Magistrate himself conducted the enquiry. According to him, on mere misquoting in the Roznama without any order by the learned Magistrate, it could not be said that the learned Magistrate has chosen to send the case for police enquiry. Therefore, according to him, no ground is made for interfering with the impugned order.

9. Mr. Patil further submitted that in all cases it is not necessary to examine the witnesses in enquiry conducted under Section 202 by the Magistrate. In suitable cases particularly, in complaints for the offence punishable under Section 138 of the N.I. Act the Magistrate can rely on the affidavit and the documents filed alongwith the complaint which has been done in the present case. According to him, the learned Magistrate has applied his mind and therefore, it cannot be said that no enquiry was conducted under Section 202 of the Cr.P.C. To buttress his

submission, he seeks to rely on the decision of the Hon'ble Supreme Court in *Suo Motu Writ Petition (CRL) No.2 of 2020*, with reference to expeditious trial of cases under Section 138 of the N.I. Act, 1881.

10. There is no dispute that if an accused is residing beyond the territorial jurisdiction of the Magistrate before whom the complaint is made, the Magistrate has to postpone the process and shall conduct the enquiry under Section 202. A reference can be made to the decisions of *Vijay Dhanuka and Birla Corporation* (supra).

11. This takes me to the first submission of the learned counsel for the applicant where he submits that without waiting for the report of the enquiry, the impugned order came to be passed. Perusal of record shows that by order dated 08.09.2022, the learned Magistrate has observed as under:

“Order below Exh.1

(Dt.08/09/2022)

Perused record. Accused is residing out of jurisdiction of this Court. Therefore, this matter is kept for inquiry under Section 202 of the Cr.PC.”

12. After passing this order, the impugned order dated 10.10.2022 has been passed, which is reproduced as under:

“Order below Exh.01

(Dt.10/10/2022)

Perused complaint and verification. Heard learned advocate for the complainant. Upon perusal of averements made in complaint and verification, it reveals that, disputed cheque is signed by accused no.1 for Sanjay Stone Crusher i.e. accused no.1. In (2021)4 SCC 675; Alka Khandu Avhad ..Vs.. Amar Syamprasad Mishra & Anr. is held that, a person though liable to pay the debt jointly, cannot be prosecuted unless the bank account is jointly maintained and the accused was signatory to the cheque. Therefore, accused No.3 to 5 cannot be held responsible unless they are signatory to be disputed cheque and therefore process cannot be issued against non-signatory of disputed cheque. Upon perusal of complaint and verification, prima-facie offence punishable under section 138 of the Negotiable Instrument Act has been specifically made out in the complaint against accused No.1 and 2. Hence, following order is passed.

Order

1) Issue process for offence punishable under section 138 of the Negotiable Instrument Act against the accused No.1 and 2 only returnable on

2) Complaint is dismissed against accused No.3 to 5.”

13. Thus, on perusal of the order dated 08.09.2022 it can be seen that the Magistrate did not mention that the matter is to be sent to police for conducting enquiry under Section 202 of the Cr.P.C. It only refers that since the accused is residing outside territorial jurisdiction of the Magistrate therefore, the matter is kept for enquiry under Section 202 of the Cr.P.C. Thus, on perusal of this order, by no stretch of imagination, it can be inferred that the Magistrate has chosen to send the matter for enquiry to the police. Just because in the Roznama the stage is shown as “for enquiry report” it does not suggest that the matter was sent to the police for enquiry under Section 202 of the Cr.P.C. Therefore, I do not find any force in the argument of the learned counsel for the applicant.

14. Turning to the submission of the learned counsel for the applicant that no enquiry was conducted under Section 202 of the Cr.P.C., perusal of the impugned order goes to show that the learned Magistrate relied on the verification of the complainant and perused the documents and after discussing reasons, passed the impugned order.

15. It will be relevant to refer the judgment of Hon’ble Supreme Court in *Suo Motu Writ Petition (CRL) No.2 of 2020*,

with reference to expeditious trial of cases under Section 138 of the N.I. Act, 1881. In para 12 of the said judgment, the Hon'ble Supreme Court has held as under :

“12. Another point that has been brought to our notice relates to the interpretation of Section 202(2) which stipulates that the Magistrate shall take evidence of the witness on oath in an inquiry conducted under Section 202(1) for the purpose of issuance of process. Section 145 of the Act provides that the evidence of the complainant may be given by him on affidavit, which shall be read in evidence in any inquiry, trial or other proceeding, notwithstanding anything contained in the Code. Section 145(2) of the Act enables the court to summon and examine any person giving evidence on affidavit as to the facts contained therein, on an application of the prosecution or the accused. It is contended by the learned Amici Curiae that though there is no specific provision permitting the examination of witnesses on affidavit, Section 145 permits the complainant to be examined by way of an affidavit for the purpose of inquiry under Section 202. He suggested that Section 202(2) should be read along with Section 145 and in respect of complaints under Section 138, the examination of witnesses also should be permitted on affidavit. Only in exceptional cases, the Magistrate may examine the witnesses personally. Section 145 of the Act is an exception to Section 202 in respect of examination of the complainant by way of an affidavit. There is no specific provision in relation to examination of the witnesses also on affidavit in Section

145. It becomes clear that Section 145 had been inserted in the Act, with effect from the year 2003, with the laudable object of speeding up trials in complaints filed under Section 138. If the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. On a holistic reading of Section 145 along with Section 202, we hold that Section 202 (2) of the Code is inapplicable to complaints under Section 138 in respect of examination of witnesses on oath. The evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses. In suitable cases, the Magistrate can examine documents for satisfaction as to the sufficiency of grounds for proceeding under Section 202.”

16. In para 24 of the said decision, the Hon’ble Supreme Court gave directions, which are reproduced here :

“24. The upshot of the above discussion leads us to the following conclusions:

1) The High Courts are requested to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 of the Act from summary trial to summons trial.

2) Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the Court.

3) *For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses.*

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

5) *The High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonour of cheques issued as part of the said transaction.*

6) *Judgments of this Court in **Adalat Prasad** (supra) and **Subramaniam Sethuraman** (supra) have interpreted the law correctly and we reiterate that there is no inherent power of Trial Courts to review or recall the issue of summons. This does not affect the power of the Trial Court under Section 322 of the Code to revisit the order of issue of process in case it is brought to the court's notice that it lacks jurisdiction to try the complaint.*

7) *Section 258 of the Code is not applicable to complaints under Section 138 of the Act and findings to the contrary in **Meters and Instruments** (supra) do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the Trial Courts to reconsider/recall*

summons in respect of complaints under Section 138 shall be considered by the Committee constituted by an order of this Court dated 10.03.2021.

8) All other points, which have been raised by the Amici Curiae in their preliminary report and written submissions and not considered herein, shall be the subject matter of deliberation by the aforementioned Committee. Any other issue relating to expeditious disposal of complaints under Section 138 of the Act shall also be considered by the Committee.”

17. Thus, reading Section 145 of the N.I. Act as well as observations made by the Hon’ble Supreme Court referred above, it can be concluded that when the Magistrate chooses to conduct the enquiry by himself in a complaint for the offence punishable under Section 138 of the N.I. Act it is not necessary for him to examine the witnesses and in suitable cases the learned Magistrate can rely on the verification of the complainant on affidavit and documents during enquiry. Needless to mention, the present case in hand is a complaint for the offence punishable under Section 138 of the N.I. Act. It appears from the order dated 08.09.2022 that the learned Magistrate did not straightway issue the process and kept the matter for enquiry and after relying on the verification of the complainant on affidavit, averments made in

the complaint as well as after discussing the documents annexed to the complaint, passed the impugned order. Therefore, I am not in agreement with the argument advanced by the learned counsel for the applicant that no enquiry was conducted under Section 202 of the Cr.P.C. The impugned order indicates the satisfaction of the Magistrate regarding availability of the material and therefore passed the impugned order. Hence, no interference is required in the impugned order except to the extent of the observations made by the learned Additional Sessions Judge in Criminal Revision No.194 of 2022 against which the Criminal Writ Petition came to be filed by the co-accused, which came to be withdrawn. The application is dismissed.

JUDGE

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