



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

CRIMINAL APPLICATION (APL) NO.32 OF 2024

APPLICANT : Mr. Ritwik S/o. Milind Buddhisagar,
(Accused) Aged about 30 years, Occ.: Business, R/o. 15, Snehal Complex, 29/9, Kothrud Behind Mantri Park, Pune.

..VERSUS..

NON-APPLICANT : The Dharampeth Mahila Multi State,
Co-operative Society, Limited, Nagpur,
(Earlier known as the Dharampeth
Urban Credit Co-operative Society Ltd.)
having head office at Swamy Arcade,
Laxmi Bhavan Chowk, West High Court
Road, Dharampeth, Nagpur-10 and
branch at Pune. Through Its Branch
Manager, R/o. Nagpur, Tah./Dist.:
Nagpur, Maharashtra. **(Rajesh
Nilkanthrao Sathwane)**

WITH

CRIMINAL APPLICATION (APL) NO.26 OF 2024

APPLICANTS : 1 Mr. Milind Aniruddha Buddhisagar,
(Accused) Aged 62 years, Occ. Business, R/o. 15,
Snehal Complex, 29/9, Kothrud, Behind
Mantri Park, Pune.

2 Mrs. Smita Milind Buddhisagar,
Aged 55 yrs., Occ. Business, R/o.15,
Snehal Complex, 29/9, Kothrud, Behind
Mantri Park, Pune.

..VERSUS..

NON-APPLICANT The Dharampeth Mahila Multi State,
Co-operative Society, Limited, Nagpur,
(Earlier known as the Dharampeth
Urban Credit Co-operative Society Ltd.)
having head office at Swamy Arcade,

Laxmi Bhavan Chowk, West High Court
Road, Dharampeth, Nagpur-10 and
branch at Pune. Through Its Branch
Manager, R/o. Nagpur, Tah./Dist.:
Nagpur, Maharashtra.

Mr Y. J. Chandurkar, Advocate for Applicants in both applications.
Mr A. K. Tripathi, Advocate for Non-Applicant in both applications.

CORAM : **M. W. CHANDWANI, J.**
RESERVED ON : **8th MARCH, 2024.**
PRONOUNCED ON **17th APRIL, 2024.**

JUDGMENT

. Heard.

2. **Admit.**

3. These two applications under consideration are filed by the applicants against the common non-applicant arising out of two different complaints but, on the same set of facts and involved common issue and contention. Hence, the same were heard analogously and I propose to dispose of these two applications by this common judgment and order.

4. The facts, which gave rise to the present applications, can be summarized as under :

The non-applicant filed two complaints/cases bearing Summary Criminal Case Nos.29195 of 2019 and 29196 of 2019 against the applicants for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as “the N.I. Act” for short) for dishonour of cheques, before the learned Additional Chief Judicial Magistrate, Nagpur (ACJM). By the impugned order dated 04.01.2020, the learned ACJM issued process against the applicants in both the applications for offence punishable under Section 138 of the N.I. Act. Feeling aggrieved with the order of issuance of process, the present applications have been filed for quashing the order of issuance of process passed by the learned ACJM, Nagpur, in Summary Criminal Case Nos.29195 of 2019 and 29196 of 2019 mainly on the ground that the applicants, in both the applications, are residing at the place beyond the area in which the learned Magistrate exercises his jurisdiction. Despite this fact, the learned Magistrate failed to conduct an inquiry mandated by Section 202 of the Code of Criminal Procedure, 1973 (Cr.P.C.).

5. Mr Y. J. Chandurkar, learned counsel appearing on behalf of the applicants, would submit that the applicants, who are original accused in Summary Criminal Case Nos.29195 of 2019 and 29196 of 2019, are residing at Pune beyond the area in which the learned ACJM exercises his jurisdiction. Therefore, the learned ACJM ought to have postponed the issuance of process against the applicants and shall have held inquiry, as contemplated under Section 202 of the Cr.P.C., which is not done in this case. Therefore, the orders of issuance of process, passed by the learned ACJM, would be vitiated.

6. The learned counsel for applicants vehemently submits that if the accused is residing at the place beyond the area of jurisdiction of the learned Magistrate, before whom, the complaint is made, he shall conduct the inquiry instead of issuing the process and after getting himself satisfied that there are sufficient grounds for proceeding, can issue process. The inquiry, as contemplated under Section 202 of the Cr.P.C., is not discretionary but is mandatory and not conducting the mandatory inquiry, it would vitiate the issuance of process. To

buttress his submission, he seeks to rely on the decisions of the Hon'ble Supreme Court in the cases of *Vijay Dhanuka and Ors. vs. Najima Mamtaj and Ors., (2014) 14 SCC 638, Abhijit Pawar vs. Hemant Madhukar Nimbalkar and Anr., (2017) 3 SCC 528, Aroon Poorie vs. Jayakumar Hiremath, (2017) 7 SCC 767* and *Birla Corporation Limited vs. Adventz Investments and Holdings Limited and Ors., (2019) 16 SCC 610.*

7. The learned counsel for applicants would submit that the Hon'ble Supreme Court, in a decision in Suo Motu Writ Petition (CRL) No.2 of 2020, in reference to expeditious trial of cases under Section 138 of the N.I. Act, 1881, also considered the above referred decisions and reiterated that the inquiry to be held by the Magistrate before issuance of summons to the accused persons residing outside the jurisdiction of the Court, cannot be dispensed with even in complaints filed for offence punishable under Section 138 of the N.I. Act. The learned counsel for applicants submits that the learned ACJM has neither examined the witnesses nor satisfied himself about the existence of sufficient ground for proceeding against the applicants, who are

residing outside the jurisdiction of the learned ACJM. Therefore, according to him, the orders of issuance of process in both the complaints are bad in law and are required to be set aside.

8. Conversely, Mr Tripathi, learned counsel appearing for non-applicant – Co-operative Society, submitted that though the inquiry contemplated under Section 202 of the Cr.P.C. is mandatory in case the accused resides outside the jurisdiction of the learned Magistrate, before whom, the complaint is made, but when the case entirely depends on documents particularly in complaint filed for offence punishable under Section 138 of the N.I. Act, there is no need to examine the witnesses and even the affidavits filed by the complainant would suffice the purpose of inquiry. According to him, the learned ACJM has conducted the inquiry under Section 202 of the Cr.P.C. and after going through the affidavits filed by the non-applicant/complainant as well as the documents filed alongwith the complaints found that there are sufficient grounds to proceed against the applicants, therefore, he issued process against the applicants by the impugned orders. According to him, there is no merit in the applications, hence the

same are required to be dismissed.

9. Considering the submissions made by the learned counsel for the respective parties, it is apt to reproduce Section 202 of the Cr.P.C., which reads as under :

“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 witness 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 202 of the Cr.P.C. speaks about postponing the issuance of process against the accused in case he resides beyond the area in which the Magistrate before whom the complaint is made exercises his jurisdiction. In that case, the Magistrate either inquires into the case himself or directs an investigation to be made by the Police Officer for the purpose of deciding whether there are sufficient grounds for proceeding or not.

10. Whether the inquiry, as contemplated under Section 202 of the Cr.P.C., is directory or mandatory fell for consideration before the Hon'ble Supreme Court time and again in the decisions of Vijay Dhanuka (supra), Abhijit Pawar (supra), Birla Corporation Limited (supra) as well as Aroon Poorie (supra), relied upon by the applicants, wherein it was held that when an accused resides beyond the area in which the Magistrate before whom the complaint is made exercises his jurisdiction, the inquiry that is to be held by the Magistrate before issuance of summons to the accused, cannot be dispensed with. When the

Magistrate comes to a conclusion after holding the said inquiry that there are sufficient grounds to proceed against the accused, he can issue the process. There is no dispute with respect to this legal position.

11. This takes me to 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. 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.

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.”*

12. Thus, in view of the law enunciated in the aforesaid case, in a complaint filed for the offence punishable under Section 138 of the N.I. Act, while conducting inquiry by himself, in suitable cases, the Magistrate may not examine the witnesses including the complainant. In suitable cases, the Magistrate may rely on the affidavit filed by the complainant and on examination of documents may get satisfied as to the sufficiency of grounds for proceeding under Section 202 of Cr.P.C.

13. Needless to mention, the present complaints are filed for the offence punishable under Section 138 of N.I. Act. While issuing the process, the learned Magistrate has passed the following order below Exhibit – 1 in Summary Criminal Case No.29196 of 2019:

“ORDER BELOW EXH-1

- 1. Perused the complaint, verification on affidavit and supporting documents.*
- 2. The complainant has made out prima facie case against accused No.1 and 2 for offence punishable under Section 138 of the Negotiable Instruments Act.*
- 3. Hence, issue process against accused No.1 and 2 for offence punishable under Section 138 R/w Section 141 of Negotiable Instruments Act by R.P.A.D. as well as by regular mode on addresses mentioned in the complaint. The complainant is directed to supply the copy of complaint and documents to the accused.*

4. The complaint is dismissed against remaining accused under Section 203 of Cr.P.C.”

The learned Magistrate has also passed the following order below Exhibit – 1 in Summary Criminal Case No.29195 of 2019:

“ORDER BELOW EXH-1

Perused the complaint, verification on affidavit and supporting documents. The complainant has made out prima facie case against the accused for offence punishable under Section 138 of Negotiable Instruments Act. Hence, issue process against the accused no.3 for offence punishable under Section 138 of Negotiable Instruments Act by R.P.A.D. as well as by regular mode on addresses mentioned in the complaint. The complainant is directed to supply the copy of complaint and documents to the accused. Complaint dismissed against remaining accused no.1, 2 and 4.”

14. The learned ACJM, Nagpur, after perusing the affidavit filed by the complainant and various documents in both of the complaints such as cheque memo of bank and issuance of notice, passed the impugned orders. The learned ACJM not only issued the process against the applicants but also dismissed the complaint against some of the accused persons. This itself goes to show that the learned Magistrate did not straightway issue the process, but conducted the inquiry by himself by perusing the

affidavits and examining the documents, as contemplated under Section 202 of the Cr.P.C. and after satisfying himself about sufficiency of ground, issued the process against the applicant(s) in both the complaints. Therefore, the case of *K & K Foundery Pvt. Ltd. through its Managing Director and Ors. vs. State of Maharashtra and Anr.*, decided on 10.03.2022, will not be helpful to them.

15. Therefore, the applications are sans merit and stand dismissed.

(M. W. CHANDWANI, J.)