



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

**CRIMINAL WRIT PETITION NO. 592 OF 2024
AND**

CRIMINAL WRIT PETITION NO. 593 OF 2024

Sagar Prabhudayal Khanna,
Age : 55 years, Occu.Business,
R/o.4, C Wing,Pooja Park,
Swami Vivekananad Road,
Bibwewadi,Pune.

...Petitioner

versus

1.The State of Maharashtra

2. Prashant Nilkanath Kodolikor,
Age : 55 years, Occu.Business.
R/o. Aashvi Khu.Tal.Sangamner,
Dist.Ahmednagar.

...Respondents

Advocate for Petitioner in both petitions : Mr. Amit S.Savale
A.P.P for Respondent Nos. 1 in both petitions : Mr.K.K.Naik
Advocate for Respondent No.2 in both petitions: Mr.A.N.Nagargoje

CORAM : SHAILESH P. BRAHME, J.

RESERVED ON : 01st APRIL 2025

PRONOUNCED ON : 08th APRIL 2025

JUDGMENT :

1. Rule. Rule is made returnable forthwith with the consent of the parties.
2. Both the petitions can be disposed of by common judgment and order as the facts and the circumstances are identical. I propose to refer the papers of Criminal Writ Petition No. 593 of 2024 for the sake of convenience. In Criminal Writ Petition No. 592 of 2024, cheque involved is of Rs.15,00,000/-(Rupees Fifteen Lacs Only) whereas in Criminal Writ Petition No. 593 of 2024 it is of Rs.2,00,000/-(Rupees Two Lacs Only).
3. The petitioner is the accused facing prosecution under Section 138 of Negotiable Instruments Act,1881 (in short 'N.I.Act') in S.C.C. No.988 of 2022 for dishonour of cheque of Rs.2,00,000/- and in S.C.C.No.989 of 2022 for dishonour of cheque of Rs.15,00,000/-. It is alleged by the respondent/complainant that petitioner had launched housing scheme and respondent had proposed to purchase two flats.From time to time earnest of Rs.17,00,000/- was paid by the respondents to the petitioner. The petitioner avoided further transaction and the sale deed could not be executed. He proposed to

refund the amount and cheques in question were issued on 13.04.2022. Those were presented on 30.05.2022 by the respondent to Pravara Co-operative Bank. They returned with a remark that 'account was closed'. The respondent issued a notice demanding the payment on 27.06.2022 and on 11.08.2022 he lodged a complaint.

4. The verification of the petitioner was recorded and even affidavit in lieu of examination-in-chief was also submitted by the respondents. On the basis of the complaint, verification and documents, trial court passed order of issuance of process against the petitioner under section 138 of N.I.Act vide order dated 04.03.2023. Being aggrieved petitioner referred revision application. By judgment and order dated 23.02.2024, revisions were dismissed. Against those orders, present petitions are preferred.

5. Learned counsel Mr.Savale appearing for the petitioner submits that no objective scrutiny was made by the trial court to ascertain basic ingredients of offence under section 138 of N.I.Act. It is submitted that date of presentation of the cheques was overlooked which was 11.05.2022. The memo returning the cheque in all

probabilities could not have been of 30.05.2022. The notice of demand is barred by time and consequentially no offence is made out under section 138 of N.I.Act. It is submitted that no procedure as contemplated by Section 202 of Cr.P.C (Section 225 of B.N.S.S) was undertaken. The independent witnesses were available but not examined to ascertain the date of presentation of the cheques.

6. It is submitted that even the revisional court observed that the cheque appeared to have been deposited on 11.05.2022 from the franking overleaf of the cheque. It is submitted that date of presentation was ambiguous. It is an abuse of process of law to proceed against the petitioner. It is vehemently submitted that no reasons are assigned by magistrate in the impugned order as to why he is restricting the inquiry to examination of documents without insisting for examination of witnesses. Petitioner relied on following judgments of this Court :

- i) **Bansilal S.Kabra vs. Global Trade Finance Limited and Anr.** in Criminal Application No.1344 of 2010.
- ii) **Sayed Mohammed Omair Sayed Ibrahim vs. State of**

Maharashtra reported in 2022 CJ (Bom) 1023.

iii) **Ekveera Jewellers Anturli, Jalgaon vs. Shaunak Deepak Kulkarni and Anr.** in Criminal Writ Petition No. 1310 of 2022.

7. *Per contra*, learned counsel Mr.Nagargoje appearing for Respondent No.2 submits that both the courts below have rightly exercised the jurisdiction and concurrently held that offence was made out prima-facie. It is submitted that the petitioner only pressed into service the submission of non-adherenace of the procedure under Section 202 of Cr.P.C (Section 225 of B.N.S.S) before the revisional court. Other submissions are being put forth for the first time in this Court and hence are liable to be rejected. It is submitted that to attract the offence under Section 138 of N.I.Act,1881 what is relevant is the date of dishonour of cheque which is unequivocally, 30.05.2022. The payee is entitled to present the cheque on multiple occasions. The notice of demand was issued on 27.06.2022 well within one month from 30.05.2022. The submission of the petitioner are based upon conjecture and surmises. Even the petitioner did not endeavour to reply the notice.

It is submitted that learned trial court is satisfied with the complaint, verification and documents before issuing process. He relies on the judgment of Supreme Court in the matter of **In Re: Expeditious Trial of Cases Under Section 138 of N.I.Act,1881** in Suo Motu Writ Petition (CRL.) No. 2 of 2020.

8. I have considered rival submissions of the parties. The process was issued by learned magistrate after recording verification of the respondents and considering complaint, affidavit and the documents submitted alongwith the complaint. The complaint, verification and affidavit of examination-in-chief unequivocally mention that cheque was presented with Pravara co-operative bank, branch at Ashvi Khurd on 30.05.2022. On the same date, memo was issued by the bank returning the cheque due to closure of account. The overleaf of the cheque does not show that it was presented on 11.05.2022. The notice of demand issued on 27.06.2022.

9. The statutory provision is as follows :

“138.Dishonour of cheque for insufficiency, etc., of funds in the account -

(a).....

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.”

. In view of above clause (b) of section 138 of N.I. Act, demand notice was well within time. The tangible material was properly appreciated by the Magistrate in issuing process. There is a satisfaction that statutory timeline has been followed and a case is made.

10. The submission of the petitioner that cheque might have been presented on 11.05.2022 and overleaf shows 11.05.2022 are based on conjectures and surmises. It would be open for the petitioner to demonstrate during full-fledged trial that infact it was actually presented on 11.05.2022. The submission is a defence plea which could not have been taken into account while issuing process. The material on record does not suggest any other date than 30.05.2022

as a date of presentation of cheque. Hence, the submissions are rejected.

11. The petitioner was not residing within territorial jurisdiction of the trial magistrate. It's not a case that merely on the basis of averments in the complaint, the process was issued. The verification of the complainant was recorded. The affidavit of examination-in-chief was filed by the respondents. The supporting documents were considered. This exercise squarely falls within four corners of Section 202 of Cr.P.C. (Section 225 of B.N.S.S).

12. In this regard respondents relied on the judgment of Supreme Court in the matter of **In Re: Expeditious Trial of Cases Under Section 138 of N.I.Act,1881** (supra). It's paragraph Nos.12 and 24 are as follows :

"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 Amicus 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."

"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).....

6).....

7).....

8).....”

13. In pursuance of the direction issued by Hon’ble Apex Court, a circular was issued by Registrar General of Bombay High Court on 27.01.2022 which is also referred to in the judgment of full-bench in the matter of **Bansilal S.Kabra** (supra).Following is relevant extracts :

"2. On receipt of any complaint under Section 138 of N.I. Act, wherever it is found that any accused is resident of the area beyond the territorial jurisdiction of the magistrate concerned, an inquiry shall be conducted by the magistrate to arrive at sufficient grounds to proceed against the

accused as prescribed under Section 202 of Cr.P.C.

3. While conducting any such inquiry under section 202 of Cr.P.C., the evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the magistrate may restrict the inquiry to examination of documents without insisting for examination of witnesses for satisfaction as to the sufficiency of grounds for proceeding under the said provision".

14. Petitioner relied on the judgment of this Court in the matter of **Sayed Mohammed Omair Sayed Ibrahim** (supra). The ratio laid down can not be made applicable. The cheques in that case were issued towards security and it was agreed between the parties that payee would not deposit the cheque once the amount is received in cash. The facts of that case are distinguishable. In the case in hand, sufficient care was taken to comply Section 202 of Cr.P.C. (Section 225 of B.N.S.S). Hence, the ratio can not be hold the field.

15. Petitioner further relied on the judgment of this Court in the matter of **Ekveera Jewellers Anturli, Jalgaon** (supra). In it's paragraph No.3, the order of issuance of process was reproduced. The judgment is distinguishable on facts and the principles can

not be made applicable to the present case.

16. It is not the purport of the constitutional bench judgment of the Apex Court that in each and every case if the magistrate decides to dispense with the evidence of the witness on affidavit, he should record reasons for doing so. It can not be said that if the reasons are not recorded, then the order becomes vulnerable.

17. Full-bench of Bombay High Court had an occasion to consider constitutional bench judgment of Apex Court while deciding reference in **Bansilal S.Kabra vs. Global Trade Finance Limited and Anr.** in Criminal Application No.1344 of 2010. The purport of the judgment of Apex Court is elaborately dealt with by the full-bench in its paragraph No.(7). It is nowhere stated that it is mandatory for the magistrate to record the reasons for not examining the witnesses on affidavit while exercising power under Section 202 of Cr.P.C. (Section 225 of B.N.S.S) and the absence of recording of the reasons would amount to procedural lapses or non application of mind. The submission of learned counsel for the petitioner that absence of any reasons in the

order of magistrate as to why he is restricting to the examination of documents without examining the witnesses, would be illegality can not be countenanced.

18. The magistrate in the present case issued process by examining documents, verification and affidavit of examination-in-chief of the complainant. This was sufficient compliance of Section 202 of Cr.P.C (Section 225 of B.N.S.S). The revisional court dealt with all aspects of the matter and arrived at plausible and just conclusion. I do not find any perversity or error of jurisdiction in the impugned order and judgments. No case is made out to cause interference in the impugned order and judgment.

19. For the reasons stated above, I find no merit in the petitions. Hence, Criminal Writ Petitions are dismissed. Rule stands discharged.

[SHAILESH P. BRAHME, J.]

vsj