



131 **IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-8917-2025 (O & M)

Date of decision: 25.02.2025

AKSHAY JAIN

...PETITIONER

V/S

STATE OF HARYANA AND ANOTHER

...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Jatinder K. Sharma, Advocate for the petitioner.

Mr. Deepak Vashishth, Advocate for the complainant.

HARPREET SINGH BRAR, J. (ORAL)

CRM-8004-2025

1. This is an application for placing on record Annexure P-10 to P-24 and for exemption from filing the certified/typed copy thereof.
2. Allowed as prayed for.
3. Annexures P-10 to P-24 are taken on record subject to all just exceptions.

MAIN CASE

1. Present petition has been filed under Section 528 BNSS seeking quashing of criminal complaint No.NACT/51235 of 2019 titled as '*Ravi Karan Kapoor vs. Akshay Jain*' (Annexure P-2) as well as summoning order dated 31.01.2020 (Annexure P-9) passed by learned Judicial Magistrate First Class, Gurugram and all subsequent proceedings arising therefrom.
2. Succinctly, the facts are that for the purpose of investment in a property, the complainant gave an amount of Rs.40 lakhs to the petitioner. However, later on the complainant came to know that the petitioner accused



has duped the complainant and forged the documents related to the property. When the complainant demanded his money back, the petitioner-accused issued three cheques bearing Nos.087561, 087562 and 087563 dated 07.07.2017, 07.08.2017, 07.09.2017 respectively for an amount of Rs.5 lakhs each. When the said cheques were presented for encashment in the bank, two cheques bearing Nos.087561 and 087562 were returned with remarks "Drawer Signature Differ" and cheque bearing No.087563 was returned with remarks "Insufficient Funds". Thereafter, upon the assurance given by the petitioner/accused, the complainant presented the cheque bearing No.107437 dated 07.08.2019 of Rs. 25,00,000/-. The same was returned back with the remarks "Non-CTS Cheque". Complainant served a legal notice upon the accused-petitioner through post, demanding the cheque amount. Despite issuance of legal notice, petitioner-accused failed to make the payment to the complainant. Hence, the complaint was filed.

3. Learned counsel for the petitioner *inter alia* contends that a facilitation agreement dated 16.10.2012 (Annexure P-1) was executed between the parties for the purpose of preparing a fresh SLP and file the same before Hon'ble Supreme Court of India in respect of the land situated in Delhi and it was agreed that when the matter shall be decided, the profit earned by selling/converting the same shall be shared in 1/3rd ratio among the petitioner, complainant/respondent No.2 and one Mr. Sandeep Garg. Further, it was agreed that respondent No.2 shall invest an amount of Rs.25 lakhs for the purpose to get legal encumbrance removed from the property in dispute. Moreover, the instant complaint is based on false and frivolous grounds as the petitioner did not forge any documents to dupe respondent No.2. It is further



contended that provisions of Section 138 of NI Act shall not apply to the liabilities for the debts, which are not legally enforceable by law. Furthermore, as per the facilitation agreement, the time to recover the legally enforceable debt in the instant case ends on 14.10.2016. Hence, the trial Court ought not to have summoned the petitioner. He submits that the learned trial Court did not seek the report under Section 202 of the Cr.P.C. before issuance of process against the petitioner by passing summoning order dated 31.01.2020 (Annexure P-9).

4. Having heard the learned counsel for the petitioner and after perusing the record of the case, it transpires that the drill of Section 225 BNSS (erstwhile Section 202 Cr.P.C.) was not followed before issuance of process.

5. A study of Section 225 BNSS is called for, which is reproduced below:

Section 225. 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 212, 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 223.*



(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 Sanhita on an officer in charge of a police station except the power to arrest without warrant.

6. Time and again, the constitutional courts have reiterated that the drill of Section 202 Cr.P.C. (now Section 225 BNSS) is mandatory in nature. A two Judge bench of Hon'ble Supreme Court in ***Abhijit Pawar vs. Hemant Madhukar 2017(3) SCC 528***, speaking through Justice A.K. Sikri has held as follows:

“28. No doubt, the argument predicated on Section 202 of the Cr.P.C. was raised for the first time by A-1 before the High Court. Notwithstanding the same, being a pure legal issue which could be tested on the basis of admitted facts on record, the High Court could have considered this argument on merits. It is a settled proposition of law that a pure legal issue can be raised at any stage of proceedings, more so, when it goes to the jurisdiction of the matter (See : National Textile Corpn. Ltd. Vs. Nareshkumar Badrikumar Jagad; [(2011) 12 SCC 695].

29. We may like to record that though Mr. Bhatt had refuted the arguments founded on [Section 202](#) of Cr.P.C., even he had submitted that in case this Court is satisfied that mandatory requirement of [Section 202](#) is not fulfilled by the learned Magistrate before issuing the process, this Court can direct the Magistrate to do so. Mr. Bhatt, for this purpose, referred to the judgment in the case of the National Bank of Oman.



30. For the aforesaid reasons, Criminal Appeal arising out of SLP (Crl) No. 9318 of 2012 is allowed thereby quashing the notice dated 24th November, 2009 in respect of A-1 with direction to the learned Magistrate to take up the matter afresh qua A-1 and pass necessary orders as are permissible in law, after following the procedure contained in Section 202, Cr.P.C.”

Reliance in this regard can also be placed on the judgment rendered by the Hon’ble Supreme Court in **National Bank of Oman vs. Barakara Abdul Aziz and another 2013(2) SCC 488** and this Court in **Dr. Jasminder Kaur vs. Raj Karan Singh Boparai CRM-M-20260-2008**.

7. This issue has also been dealt with a Constitution bench of the Hon’ble Supreme Court **In re: Expeditious Trial of Cases under Section 138 NI Act 1881** in *Suo Moto Writ Peition (Crl.) No.2 of 2020*, analysed the said issue and concluded as follows:

“10. Section 202 of the Code confers jurisdiction on the Magistrate to conduct an inquiry for the purpose of deciding whether sufficient grounds justifying the issue of process are made out. The amendment to Section 202 of the Code with effect from 23.06.2006, vide Act 25 of 2005, made it mandatory for the Magistrate to conduct an inquiry before issue of process, in a case where the accused resides beyond the area of jurisdiction of the court. (See: **Vijay Dhanuka & Ors. v. Najima Mamtaj & Ors, Abhijit Pawar v. Hemant Madhukar Nimbalkar and Anr. and Birla Corporation Limited v. Adventz Investments and Holdings Limited & Ors.**). There has been a divergence of opinion amongst the High Courts relating to the applicability of Section 202 in respect of complaints filed under Section 138 of the Act. Certain cases under Section 138 have been decided by the High Courts upholding the view that it is mandatory for the Magistrate to conduct an inquiry, as provided in Section 202 of the Code,



before issuance of process in complaints filed under Section 138. Contrary views have been expressed in some other cases. It has been held that merely because the accused is residing outside the jurisdiction of the court, it is not necessary for the Magistrate to postpone the issuance of process in each and every case. Further, it has also been held that not conducting inquiry under Section 202 of the Code would not vitiate the issuance of process, if requisite satisfaction can be obtained from materials available on record.

*11. The learned Amici Curiae referred to a judgment of this Court in **K.S. Joseph v. Philips Carbon Black Ltd & Anr.** where there was a discussion about the requirement of inquiry under Section 202 of the Code in relation to complaints filed under Section 138 but the question of law was left open. In view of the judgments of this Court in **Vijay Dhanuka (supra)**, **Abhijit Pawar (supra)** and **Birla Corporation (supra)**, the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot be dispensed with. The learned Amici Curiae recommended that the Magistrate should come to a conclusion after holding an inquiry that there are sufficient grounds to proceed against the accused. We are in agreement with the learned Amici.” (emphasis added)*

8. Furthermore, the following directions were issued in ***In re: Expeditious Trial of Cases under Section 138 NI Act 1881(supra)***:

“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.”(emphasis added)

9. The intention behind Section 202 Cr.P.C. (now Section 225 BNSS) is to ensure that sufficient grounds exist in order to proceed against an accused in a private complaint. As such, it is pertinent that the concerned Court passes an order indicating substantial compliance of the aforementioned provision, in view of the directions issued in *In re: Expeditious Trial of Cases under Section 138 NI Act 1881(supra)*.

10. In view of the discussion above, the present petition is allowed and summoning order dated 31.01.2020 (Annexure P-9) is set aside. The matter is remanded back to concerned Court to consider the matter afresh in accordance with law, by taking recourse to Section 225 BNSS (earlier Section 202 Cr.P.C.)

11. Pending miscellaneous application(s), if any, also stand(s) disposed of.

February 25, 2025
manisha

(HARPREET SINGH BRAR)
JUDGE

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|------|---------------------------|--------|
| (i) | Whether speaking/reasoned | Yes/No |
| (ii) | Whether reportable | Yes/No |