IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 1344 OF 2010

Bansilal S. Kabra .. Applicant

Versus

Global Trade Finance Limited & Anr .. Respondents

…

Mr.Arun Mehta with Aniket Srivastav i/b Akshar Laws for the applicant.
Mr.Yashpal Thakur with Mukund Pandya for respondent no.1.
Mr.H.S. Venegaonkar, P.P. for the State – respondent no.2.

CORAM: DEVENDRA KUMAR UPADHYAYA, C.J,
BHARATI DANGRE, J &
ARIF S. DOCTOR, J
DATED : 16th JANUARY 2024.

JUDGMENT:-

1 In light of the cleavage of opinion on the aspect whether the amendment in Section 202, sub clause(1) of the Code of Criminal Procedure, contemplating an inquiry before issuance of process by the Magistrate, where the accused is residing outside the jurisdiction of the Court, is discretionary or mandatory, a larger Bench was constituted by the then, Hon'ble The Chief Justice.

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Justice V.M. Kanade, (as His Lordship then was), in his order dated 9/7/2010 passed in Criminal Application No. 1344 of 2010, expressed his view that the amendment is directory and not mandatory, whilst he expressed disagreement with Justice S.C. Dharmadhikari (as his Lordship then was), who in his order passed in Criminal Application No. 2640/2009 was of the view, that the amended provision is mandatory in nature.

2 Reference made to the larger Bench was required to be deferred in the wake of the scenario, that the Appeal (Criminal Appeal No. 276/2013) preferred against the impugned order was pending before the Apex Court and subsequently, in light of the Appeal being decided on 23/9/2021, the matter is once again placed before the larger Bench, which is reconstituted on 31/10/2023.

3 We have heard learned Advocate Shri Arun Mehta along with Advocate Aniket Srivastav for the applicant, Mr. H.S. Venegaonkar, Public Prosecutor for the State and Mr.Yashpal Thakur with Advocate Mukund Pandya for the respondent no.1.

We have also perused the distinct orders passed by the respective Single Judge of this Court, resulting into this reference.

With the passage of the time, since the reference was made, there is further evolution of law on the aspect involved and though there are decisions from this Court as well as the higher

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Court, which have categorically held that the provision is mandatory in nature, in our opinion, the conundrum has been put to rest by the Constitution Bench of the Apex Court in suo motu Writ Petition (CRL) No.2 of 2020 in Re: **EXPEDITIOUS TRIAL OF CASES UNDER SECTION 138 OF THE N.I. Act, 1881**, headed by the then Hon'ble The Chief Justice of India on 16/4/2021.

While touching the significant aspects revolving around Section 138 of the Negotiable Instruments Act, 1881 ("the Act") and on being concerned with large number of pending cases, the cause was taken up, for examining the reasons for the delay in disposal of these cases and one of the facet which Their Lordships deemed appropriate to focus upon, was in regard to "Inquiry u/s.202 of the Code in relation to Section 145 of the Act".

Referring to the amendment in Section 202 of Code enforced with effect from 23/6/2006 vide Act No.25 of 2005, which made it mandatory for the Magistrate to conduct an inquiry before issuance of the process, in a case where the accused resided beyond the area of the jurisdiction of the Court, the diversion of opinion among the High Courts relating to the applicability of the said provisions to the complaints filed under Section 138 of the Act, was noted.

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The amicus curiae advanced his submissions reflecting upon the imperative nature of the amendment and what is recorded in paragraph no.11, of the Constitution Bench decision, deserves a reproduction :-

> *"11 The learned Amici Curiae referred to a judgment of this Court in K.S. Joseph Vs. 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."*

4 Another aspect, in order to curtail the delays in conclusion of the trials under the Act of 1881, which was adverted to, is in relation to interpretation of Section 202(2) of the Code, which expected the Magistrate to record evidence of the witness on oath, in an inquiry to be conducted u/s.202(1), before issuance of the process, and though in the present reference, we are not concerned with the said issue, we must note that, on this aspect, the Apex Court has held, that in the wake of Section 145 of the Act, the evidence of witness on behalf of the complainant, shall be permitted on affidavit and there is no reason for insisting on the evidence on oath. Thus, if the Magistrate prefers to hold

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an inquiry himself, it shall not be imperative for him to examine the witness on oath and in suitable cases, he may examine the documents for satisfying himself, as to the sufficiency of the grounds for proceeding u/s.202 of the Code.

5 Though the above conclusions drawn in the suo motu Writ Petition, are touching the cases under Section 138 of the Negotiable Instruments Act, 1881, at a subsequent point of time and to be precise on 23/9/2021, the Criminal Appeal filed in the present proceedings, was heard along with the group of appeals and the question involved in the matters, namely, whether an inquiry u/s.202 of the Cr.P.C, is mandatory or directory in nature, came to be answered by specifically reproducing, paragraphs 10 to 12 of the Constitution Bench Judgment, in suo motu Writ Petition No.2 of 2020 (AIR 2021, Supreme Court 1957), and since the issue raised in this regard, was already settled, each individual matter was left open to the discretion of the concerned Magistrate(s) to decide, as to what type of procedure they need to adopt in the complaints, pending adjudication before them, where the accused persons are located outside their territorial jurisdiction, and the Criminal Appeals were disposed off.

6 In order to have implementation of the orders issued by the Constitution Bench in suo motu Writ Petition dated 16/4/2021, the Registrar General of the Bombay High Court has also issued a circular on 27/1/2022, clearly issuing the following directions:-

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> *"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".*

7 In our considered view, the question, referred to the larger Bench, is already answered by the Constitution Bench of the Apex Court as above, and therefore, we do not deem it necessary to answer the reference.

However, we would like to only add, by taking note, that Chapter XV of the Code, which contemplates complaints to the Magistrate, which includes Section 202, intended to achieve twin objects; one being to enable the Magistrate to carefully scrutinize the allegations made in the complaint with a view to prevent a person named therein, as accused from being called upon to face unnecessary, frivolous or meritless complaint; and the other, to find out whether there is any material in existence, to support the allegations in the complaint. The Magistrate is therefore, duty bound to elicit all facts, having regard to the

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interest of the complainant, in absence of the accused, before he brings to book him for the accusations in the complaint. For forming an opinion to that effect, the Magistrate may himself hold an inquiry u/s. 202 of the Code, or direct investigation to be made by a police officer.

We may also add that in a contingency, when he decides to conduct an inquiry, specifically against the persons residing outside his territorial jurisdiction, the inquiry must be aimed at ascertaining the truth or otherwise in the allegations made in the complaint. It is expected that the Magistrate shall not only rely upon the averments in the complaint, as it may many a times, contain unfounded allegations which require ascertaining of its veracity, before the process is issued, so as to separate the chaff from the grain.

Before the Magistrate acts on the complaint, by issuing process against the person named as an accused therein, he shall satisfy himself about the existence of sufficient ground(s), for proceeding against him, particularly when he is residing outside his jurisdiction. The amended provision is aimed to prevent innocent persons residing at far places, from harassment by unscrupulous persons, filing unfounded and false complaints.

This would necessarily involve recording of statement of the complainant on oath, in form of verification statement or recording evidence of any witnesses produced by the

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complainant, in support of the allegations in the complaint, to find out whether a *prima facie* case for issuance of process has been made out.

We must, however, clarify that this inquiry is restricted to, ascertaining the element of truth or falsehood of the allegations in the complaint, based on the material placed by the complainant before the Court, and the inquiry is limited only to this extent i.e. to find out, if there is any matter which calls for investigation.

8 Summoning of an accused in a criminal case, is a serious matter and it certainly cannot be a perfunctory exercise. The amendment introduced in the Code therefore, contemplates that a Magistrate shall examine the nature of allegations in the complaint and take into account the evidence, both oral and documentary, to find out if it is sufficient for the complainant to succeed in establishing the charge against the accused, and justify the issuance of process against him. It is nonetheless the duty of the Magistrate to *prima facie* find out, if the case is made out by the complainant against the accused before the process is issued, so as to avoid any frivolous or vexatious claims being taken forward by the Magistrate. Only on being satisfied that the offence is made out against the person(s) named in the complaint, the process would be issued and at this stage, all the relevant facts and circumstances shall be taken into consideration before issuing process, lest it would be an instrument in the hands of a private

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complainant, as vendetta to harass the named accused. Vindication of majesty of justice and maintenance of law and order in the Society, being the primary object of criminal justice, would not bring within its sweep, a personal vengeance.

Hence, we answer the reference accordingly.

(CHIEF JUSTICE)

(SMT. BHARATI DANGRE, J.)

(ARIF S. DOCTOR, J)

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