

(2017) 03 KAR CK 0086
In the Karnataka High Court
Case No : 8639 of 2016

SRI. BABURAO CHINCHANASUR

APPELLANT

Vs

SMT. ANJANA A SHANTHAVEER

RESPONDENT

Date of Decision : 03-03-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 482](#), [Section 156](#), [Section 200](#), [Section 202](#), [Section 251](#) -
Saving of inherent powers of

Citation : (2017) 03 KAR CK 0086

Hon'ble Judges : John Michael Cunha

Bench : SINGLE BENCH

Advocate : C.V.NAGESH, RAGHAVENDRA K, G S VENKAT SUBBARAO

Final Decision : Dismissed

Judgement

1. For the second time, the petitioner has approached this Court challenging the order passed by the XV ACMM, Bengaluru taking cognizance of the offence punishable under section 138 of N.I. Act and for issuing summons to the petitioner. The earlier petition filed by the very same petitioner under section 482 Cr.P.C. was disposed of by this Court in CrI.P.No.7269/2015 and the order of taking cognizance and issuance of summons by the learned Magistrate was set-aside and the learned Magistrate was directed to take steps in accordance with law as if the complaint has only now been received and it was left to the Magistrate to take further steps in accordance with law.

2. The circumstances leading to the orders are as follows:

The respondent herein filed a complaint against the petitioner herein under Section 138 of the N.I. Act. The learned Magistrate recorded the sworn statement of the respondent/complainant and issued summons to the petitioner. The petitioner took up a contention that as he residing at a place beyond the area in which the Magistrate exercised his jurisdiction, in view of Section 202

Cr.P.C., the Magistrate is required to postpone the issue of process against the accused and either enquire 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.

3. The petitioner placed reliance on the decision of the Hon"ble Supreme Court in the case of Udai Shankar Awasthi -vs- State of U.P. and Others reported in 2013(2) SCC 435. As the petitioner was shown to be a permanent resident of Gulbarga, this Court held that it was incumbent on the learned Magistrate to follow the mandatory requirement under Section 202 Cr.P.C and accordingly, by setting aside the order taking cognizance, the learned Magistrate was directed to take further steps in accordance with law.

4. The learned Magistrate appears to have now passed an order dated 30.8.2016, which is impugned in this petition. By this order, the learned Magistrate has ordered to register a criminal case against the petitioner for the offence under section 138 of the N.I. Act and has issued summons alongwith copy of the complaint document and list of witnesses" returnable by 10.9.2016.

5. The grievance of the petitioner is that by order dated 2.8.2016, while setting at naught the earlier order passed by the Magistrate, the matter was remitted to the Trial Court with a specific direction that the trial Magistrate to take steps in accordance with law from the stage of presentation of the complaint and therefore he is required to follow the mandatory requirement of law as contemplated under section 202 Cr.P.C. It is stated, after remittal, other than accepting the sworn statement of the complainant, the trial Magistrate, has not followed the direction of this Court and without complying with the mandatory requirements of law as contemplated under section 202 Cr.P.C. has passed the impugned order.

6. In view of the said contention, an order was passed by this Court on 16.1.2017, which reads as under:-

"It is noticed that inspite of an order of this Court dated 2.8.2016 the court below has chosen to ignore the same in his present impugned order on two aspects. There is no indication in the order dated 30.08.2016 that an enquiry as contemplated under Section 202 has been held, nor even contemplated. Secondly, the court below has recalled the sworn statement by way of an affidavit which was also not countenanced in law and therefore the registry to call upon the court below to furnish its explanation as to why the order of this Court has not been followed, returnable by 31.01.2017.

Call after two weeks."

7. In response thereof, the learned Magistrate has submitted his explanation which reads as under:-

"C.C.No.17137/2015 was initially filed before 21st ACMM Bengaluru. The order of taking cognizance by the 21st ACMM was set-side by the Hon"ble High Court of

Karnataka in Crl.Petition 7269/2015 dated 2.8.2016. In the mean-while in crl.Misc.No.5320/2015 the Hon"ble Prl. City and Sessions Judge, Bengaluru as per order dated 7.11.2015, has transferred the case to this Court.

The Hon"ble High Court of Karnataka by order passed in Crl.Misc.No.7269/2015 has set-aside the order of taking cognizance and directed this court to take steps in accordance with law, as if the complaint has only now been received and it is left to the Magistrate to take further steps in accordance with law.

In pursuance of the order, complainant has submitted affidavit by way of sworn statement. Since the documents had already been marked, apart from that in Negotiable Instrument Act cases evidence by way of affidavit is accepted therefore with that bonafide honest intention this Court accepted the evidence by way of affidavit. Based on the documents already placed on record, order impugned was passed.

It is respectfully submitted that with all earnestness, only with the sole object of expedite the proceedings with bonafide intention, affidavit was accepted and order impugned was passed and not with an intention to ignore the directions of Hon"ble High Court."

8. I have heard Sri. C.V. Nagesh, the learned Sr. Advocate alongwith Sri. K. Raghavendra, the learned counsel for the petitioner and Sri. G.S. Venkat Subbarao, the learned counsel for the respondent.

9. The learned Senior counsel submits that the impugned order has been passed by the learned Magistrate in total disregard of the order passed by this Court on 2.8.2016 remitting the matter to the court below for compliance of the legal requirement under section 202 Cr.P.C.. It is the submission of the learned senior counsel that the impugned order does not even refer to the remand order passed by this Court nor does it state that the impugned order has been passed in compliance of Section 202 Cr.P.C., which necessitated this Court to call for an explanation from the Magistrate. Further placing reliance on the decision of the Hon"ble Supreme Court of India in the case of Abhijit Pawar

-vs- Hemant Madhukar Nimbalkar & Another in Crl.A.No.1225/2016, the learned counsel submits that the requirement of conducting enquiry or directing investigation before issuing process is not an empty formality. What kind of enquiry is needed under this provision has been explained in the case of Vijay Dhanuka -vs- Najima Mamtaj reported in (2014) 14 SCC 638. But in the instant case, a perusal of the summoning order does not reflect any such enquiry. It is the submission that even though in the order it is mentioned that the learned Magistrate has passed the same after reading the complaint, verification of the statement of the complaint and after perusing the copies of the documents filed on record, but the said observations is not in conformity with the requirements laid down in Section 202 Cr.P.C. The learned counsel submits that the provision contemplated in Section 202 Cr.P.C. is mandatory and an obligation is cast on the learned Magistrate to ensure before summoning the accused who resides beyond

his jurisdiction, to make necessary enquiry into the case himself or direct an investigation to be made by the police officer or by such person as he thinks fit, for finding out whether or not there was sufficient ground to proceed against the accused. In the instant case, the learned Magistrate has acted on the affidavit of the complainant and has mechanically passed the impugned order which is not in accordance with the requirement of Section 202 Cr.P.C. as held in the above decision. Therefore, the impugned order is required to be set-aside.

10. Refuting the arguments, the learned counsel for the respondent/complainant would submit that the order passed by the Trial Court is in conformity with the requirement of Section 202 Cr.P.C. and does not suffer from any error or infirmity as sought to be made by the learned counsel for the petitioner.

11. The learned counsel for the respondent submits that in order to appreciate the action taken by the learned Magistrate, it is necessary to note that the prosecution was initiated against the accused under Section 138 of the N.I. Act. The proceedings under Section 138 of N.I. Act is summary in nature. The Supreme Court in the case of Indian Bank Association and Others -vs- Union of India and Others reported in (2014) 5 SCC 590 has issued certain directions to the Magistrates trying the offences under section 138 of the N.I. Act. The said directions are as follows:-

Directions

23. "Many of the directions given by the various High Courts, in our view, are worthy of emulation by the criminal courts all over the country dealing with cases under Section 138 of the Negotiable Instruments Act, for which the following directions are being given;

23.1 The Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons. (underlining supplied)

23.2 The MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. The court, in appropriate cases, may take the assistance of the police or the nearby court to serve notice on the accused. For notice of appearance, a short date be fixed. If the summons is received back unserved, immediate follow-up action be taken.

23.3 The court may indicate in the summons that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, the court may pass appropriate orders at the earliest.

23.4 The court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under

Section 251 Cr.P.C to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for recalling a witness for cross-examination.

23.5 The court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The court has option of accepting affidavits of the witnesses instead of examining them in the court. The witnesses to the complaint and the accused must be available for cross-examination as and when there is direction to this effect by the court."

12. Further in regard to the inquiry or investigation contemplated under Section 202 Cr.P.C referring to the case in National Bank of Oman -vs- Barakara Abdul Aziz and Another reported in (2013) 2 SCC 488, the learned counsel submits that the scope of enquiry or investigation under this section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. The learned counsel has emphasized the following observation made in the above decision which reads as under:-

"Investigation under Section 202 CrPC is different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The scope of enquiry under Section 202 CrPC is, therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint:

- (i) on the materials placed by the complainant before the court;
- (ii) for the limited purpose of finding out whether a prima-facie case for issue of process has been made out; and
- (iii) for deciding the question purely from the point of view of the complainant without at all advert to any defence that the accused may have."

13. The learned counsel has also referred to a decision of the High Court of Judicature at Bombay in Criminal Application No.716/2015 to 718/2015 in Dr. (Mrs) Rajul Ketan Raj -vs- Reliance Capital Ltd. & Another disposed of on 12th February 2016. Para 40 of the said judgment reads as under:-

40. It is also pertinent to note that the Negotiable Instruments (Amendment) Act, 2015 defines and restricts the territorial jurisdiction to a court specified in Section 142(2) (a) and (b) of the Act. The said issue of territorial jurisdiction which has to be decided on the basis of the documents, eliminates the need for further inquiry on jurisdictional issue. It is therefore follows that the Magistrate can arrive at the requisite satisfaction about the essential ingredients of the offence including the issue of territorial jurisdiction at the end of the enquiry under Section 200 Cr.P.C. itself and this obviates the need of holding further enquiry under Section 202 Cr.P.C.. This being the position further enquiry under sub Section (1) of Section 202 of the Code, if held to be mandatory in complaints

filed under Section 138 N.I.Act, will be nothing but ritualistic, idle and an empty formality.

14. The learned counsel has also referred to the case of Shivjee Singh -vs- Nagendra Tiwary and Others reported in (2010) 7 SCC 578 wherein in para 25 of the judgment, it is held as under:-

25. Before this Court, the issue was considered by a two-Judge Bench M.B.Shah J. referred to Sections 200 and 202, the judgment of this Court in Ranjit Singh v. State of Pepsu and held:

"11... Further, it is settled law that the inquiry under Section 202 is of a limited nature. Firstly, to find out whether there is a prima facie case in issuing process against the person accused of the offence in the complaint and secondly, to prevent the issue of process in the complaint which is either false or vexatious or intended only to harass such a person. At that stage, the evidence is not to be meticulously appreciated, as the limited purpose being of finding out "whether or not there is sufficient ground for proceeding against the accused". The standard to be adopted by the Magistrate in scrutinizing the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202 CrPC the accused has no right to intervene and that it is the duty of the Magistrate while making an inquiry to elicit all facts not merely with a view to bring to book a person or persons against whom grave allegations are made." (underlining supplied) The learned counsel has also referred to para 30 of the judgment which reads as under:-

30. Although , Shah, J. and Thomson, J. appear to have expressed divergent views on the interpretation of proviso to Section 202(2) but there is no discord between them that non-examination of all the witnesses by the complainant would not vitiate the proceedings. With a view to clarify legal position on the subject, we deem it proper to observe that even though in terms of the proviso to Section 202(2) the Magistrate is required to direct the complainant to produce all his witnesses and examine them on oath, failure or inability of the complainant or omission on his part to examine one or some of the witnesses cited in the complaint or whose names are furnished in compliance with the direction issued by the Magistrate, will not preclude the latter from taking cognizance and issuing process or passing committal order if he is satisfied that there exists sufficient ground for doing so.

Such an order passed by the Magistrate cannot be nullified only on the ground of non-compliance with the proviso to Section 202(2). (Underlining supplied) Finally, in the same decision at para 32, the Hon"ble Supreme Court has held as under:-

32. "As a sequel to the above discussions, we hold that examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the direction given by the Magistrate in terms of the proviso to Section 202(2) is not a condition precedent for taking cognizance

and issue of process against the persons named as accused in the complaint and the High Court committed serious error in directing the Chief Judicial Magistrate to conduct further inquiry and pass fresh order in the light of the proviso to Section 202(2)."

15. In the light of the above contentions and the propositions of law canvassed by the learned counsels for the petitioner and the respondent, the point that arises for consideration is "what is the mode of enquiry contemplated under Section 202 of Cr.P.C". The Hon'ble Supreme Court in the case of Abhijit Pawar referred to by the learned counsel for the petitioner has observed that what kind of enquiry is needed under this provision has also been accepted in Vijay Dhanuka's case and has reproduced para 24 of the judgment which reads as under:-

24. The requirement of conducting enquiry or directing investigation before issuing process is, therefore, not an empty formality. What kind of "enquiry" is needed under this provision has also been explained in Vijay Dhanuka's case, which is reproduced hereunder:

"14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry" has been defined under Section 2(g) of the code, the same reads as follows:

"2. (g) "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;"

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining for the witnesses present, if any. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code."(underlining supplied)

16. Thus the principles that emerge from the above decisions are that:-

(i) The enquiry or investigation before issuing the process to an accused residing at a place beyond the area in which the Magistrate exercises his jurisdiction is mandatory as per section 202 of Cr.P.C.

(ii) The scope of enquiry under section 202 of Cr.P.C. is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process to be issued or not.

(iii) Section 202 of Cr.P.C. does not provide for any specific mode or manner of

enquiry.

(iv) The enquiry envisaged under section 202 of Cr.P.C. is different from the requirement of section 200 of Cr.P.C. or section 190 of Cr.P.C. In an enquiry under section 202 of Cr.P.C., witnesses are examined whereas under section 200 of Cr.P.C., examination of only complainant is necessary with the option of examining the witnesses present.

(v) Investigation under section 202 of Cr.P.C., is different from the investigation contemplated under section 156 of Cr.P.C.

(vi) There must be sufficient indication in the order passed by the learned Magistrate that he is satisfied with the allegations in the complaint constituting an offence.

17. Tested on the touchstone of the above principles, it is seen that the learned Magistrate has not specifically stated in the impugned order that the order was passed under section 202 of Cr.P.C. But, a reading of the said order on the face of it reveals that all the requirements of section 202 of Cr.P.C. are followed therein. What could be deciphered from the impugned order is that the learned Magistrate has (i) taken into account the materials placed by the complainant; (ii) has applied his mind to find out whether prima facie case has been made out to issue process. To this extent, the impugned order has the trappings of an order under section 202 of Cr.P.C. and satisfies the requirements thereof.

18. As held in the above decisions, the scope of an enquiry under section 202 of Cr.P.C. is restricted to find out the truth or otherwise of the allegations made in the complaint. That purpose or objective appears to have been fulfilled in the impugned order. Learned Magistrate has clearly recorded that the sworn statement makes out the transaction in respect of which the cheque was issued. Learned Magistrate has also adverted his mind to the requirements of section 138 of N.I. Act. More importantly, the learned Magistrate has referred to the various documents produced by the complainant including the receipt executed by the accused in acknowledgment of the receipt of the amount reflected in the cheque. Therefore, in my view, this order could be construed as one passed in compliance of section 202 of Cr.P.C.

19. The contention of the petitioner that the mode adopted by the Magistrate in accepting the affidavit of the complainant has rendered the exercise illegal cannot be accepted in view of the specific provisions of section 145 of N.I. Instruments Act and the law laid down by the Hon"ble Supreme Court of India in the case of INDIAN BANK ASSOCIATION & Others referred supra. Likewise, the non- examination of the witnesses also could not be taken as a factor vitiating the enquiry. In SHIVJEE SINGH vs. NAGENDRA TIWARY & Others reported in (2010) 7 SCC 578, the Hon"ble Supreme Court has held that, "Examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the directions given by the Magistrate in terms of the proviso to section 202(2) is not a condition precedent for taking cognizance

and issue of process against the persons named as accused in the complaint."

20. In the light of the settled position of law, I am of the view that the impugned order does not suffer from any error or infirmity calling for interference by this Court in exercise of jurisdiction under section 482 of Cr.P.C. Consequently, the petition is liable to be dismissed and the same is hereby dismissed. The impugned order shall be construed as the one passed in compliance of section 202 of Cr.P.C.