

ITEM NO.23

COURT NO.11

SECTION II

**S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS**

**Petition(s) for Special Leave to Appeal (Crl) No(s).9098/2012
(From the judgement and order dated 03/10/2012 in CRLA
No.3146/2012 of The HIGH COURT OF BOMBAY AT AURANGABAD)**

NATIONAL BANK OF OMAN

Petitioner(s)

VERSUS

BARAKARA ABDUL AZIZ & ANR.

Respondent(s)

(With appln(s) for exemption from filing O.T.)

Date: 03/12/2012 This Petition was called on for hearing today.

CORAM :

**HON'BLE MR. JUSTICE K.S. RADHAKRISHNAN
HON'BLE MR. JUSTICE DIPAK MISRA**

For Petitioner(s) Mr. Devashish Bharuka, Adv.

For Respondent(s)

**UPON hearing counsel the Court made the following
O R D E R**

The complainant-National Bank of Oman lodged a private complaint RTC NO.No.260/2007 in the Court of Chief Judicial Magistrate, Ahmednagar against the respondent alleging that he had cheated the bank by swindling 43,15,000/- U.A.E. Dirhams (equivalent to 5.178 Crores Indian Rupees). The gist of the complaint reads as follows:

"In the year 1995, the applicant/accused opened current account with the complainant Bank on a representation that he was holding

Indian Passport. The accused slowly gained confidence of the complainant Bank. In February 1996, the accused produced trading licence issued by Abu Dhabi Municipality and Town Planning and represented that he owned firm - M/s Bushra Textiles, situated at Abu Dhabi and engaged in retail and wholesale trading and sale of textiles garments, stationery items, electronics etc. The accused further represented that he was established in business at Abu Dhabi and was well supported by loyal clientele and was in process of expanding his business, which required financial facilities from the Bank. The accused also represented to the Bank that he had more than enough financial stability and viability to honour the financial commitments and pay back the finances made available to him by the Bank. Based on the said solemn representation, the Company in good faith granted to the accused overdraft facility of 2,50,000/- A.E.D. This facility was enhanced from time to time to the extent of 51 lacs A.E.D. by overdraft loan against trust receipts, local bill limit, credit card etc. till October 2001. The accused, however, committed breach of undertaking and failed to repay the dues of the complainant Bank.

The complainant Bank, therefore, contemplated legal action against the accused in order to obtain detention orders from the competent Court at U.A.E.

The accused thereupon approached the complainant Bank in November 2002 and entered into a restructuring/settlement agreement with the accused on 12.11.2002 for A.E.D. 43,15,000/- by converting all the outstanding liabilities into a term loan to be repaid in 48 installments.

The accused undertook to pay the said amount as per terms of MOU and also issued post dated cheques for 24 monthly installments and gave assurance and undertaking that said cheques would be honoured and loan would be repaid as per the restructuring agreement between the parties and thereby induced the Bank not to take immediate action and obtain detention order. The complainant relied upon the said representation and did not take action against the accused in November 2002. The said cheques were dishonoured for want of sufficient funds in the account and in

meanwhile the accused surreptitiously and clandestinely absconded to India without discharging his loan liability."

The complainant-Bank is not having any branch or any activity in India or nor carrying on any business in India. The Bank, therefore, decided to appoint Mr. N.B. Sapkal, as its power of attorney holder for the purpose of filing complaint and taking legal steps against the respondent, who is alleged to have duped the Bank and escaped to India. The power of attorney holder is a resident of Ahmednagar and according to the Bank it was convenient for the Bank to file the complaint at Ahmednagar. The respondent being a citizen of India, necessary sanction had to be obtained from the Central Government under the proviso to Section 188 of the Code of Criminal Procedure. Sanction was accordingly sought for from the Government of India and the Government of India, Ministry of Home Affairs, vide letter No.F/83/2007.Jud.Cell dated 26th March, 2010 accorded sanction to enquire and trial of the respondent by a court of competent jurisdiction in India.

The Chief Judicial Magistrate, Ahmednagar on 25.2.2011 passed the following order on the complaint:

"Perused complaint and the documents attached thereto. The Central Government has accorded sanction to prosecute the accused. Heard learned counsel appearing for the complainant. There are sufficient materials against the accused. The complainant has made out prima facie case against the accused. Hence process be issued for offences u/s 418 and 420 of I.P.C.

Dt.25.02.2011

Sd/-
(G.O. Agrawal)
C.J.M. Ahmednagar

The respondent challenged that order by filing Criminal Application No.3146/2012 before the High Court of Judicature, Bombay Bench at Aurangabad. It was contended that the allegations in the complaint do not *prima facie* constitute any offence or make out a case for issuance of process under Sections 418 and 420 of the I.P.C. Further, it was stated that the respondent-accused was a resident of Dakshin Kannada in the State of Karnataka and the C.J.M. Ahmednagar issued the process without complying with the mandatory requirement of making an enquiry or directing an investigation for the purpose of deciding whether or not there was sufficient ground for initiating proceedings against the accused as contemplated under Section 202 of the Code of Criminal Procedure. The High Court took the view that *prima facie* the bare allegation of cheating did not make out a case against the accused for issuance of process under Section 418 or 420 of the I.P.C. Further, it was held that the C.J.M. did not follow the procedure laid down under Section 202 of the Cr.P.C. The High Court held that the Magistrate was obliged to postpone the process against the accused and either enquire the case himself or direct an investigation to be made by a police officer or by such other officer as he thinks fit for the purpose of deciding whether or not there are sufficient grounds for proceeding in a case where the accused is residing beyond the area in which the Magistrate exercises his jurisdiction. The High Court noticed that the accused is a resident of District Dakshin Kannada, Karnataka and hence, the CJM should have followed the procedure laid down in Section 202 Cr.P.C. The High Court, therefore, set aside the order dated 25.2.2011 issuing the process under Sections 418 and 420 of the I.P.C. by the C.J.M. Ahmednagar. Aggrieved by the said order the Bank has come up with this special leave petition.

We find no error in the view taken by the High

Court that the C.J.M. Ahmednagar had not carried out any enquiry or ordered investigation as contemplated under Section 202 of the Cr.P.C. before issuing the process, considering the fact that the respondent is a resident of District Dakshin Kannada, which does not fall within the jurisdiction of the C.J.M. Ahmednagar. It was, therefore, incumbent upon him to carry out an enquiry or order investigation as contemplated under Section 202 of the Cr.P.C. before issuing the process.

The duty of a Magistrate receiving a complaint is set out in Section 202 of the Cr.P.C. and there is an obligation on the Magistrate to find out if there is any matter which calls for investigation by a criminal court. The scope of enquiry 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. Investigation under Section 202 of the Cr.P.C. 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 grounds for him to proceed further. The scope of enquiry under Section 202 of the Cr.P.C. 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 advertting to any defence that the accused may have.

Section 202 of the Cr.P.C. was amended by the Cr.P.C. (Amendment Act 2005) and the following words were inserted:

“and shall, in a case where the accused is

residing at a place beyond the area in which he exercises jurisdiction”

The notes on clauses for the above-mentioned amendment read as follow:

“False complaints are filed against persons residing at far off places simply to harass them. In order to see that the innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.”

The amendment has come into force w.e.f. 23.6.2006 vide notification No.S.O.923(E) dt. 21.6.2006.

We are of the view that the High Court has correctly held that the above-mentioned amendment was not noticed by the C.J.M. Ahmednagar. The C.J.M. had failed to carry out any enquiry or ordered investigation as contemplated under the amended Section 202 of the Cr.P.C. Since it is an admitted fact that the accused is residing outside the jurisdiction of the C.J.M. Ahmednagar, we find no error in the view taken by the High Court. All the same, the High Court instead of quashing the complaint, should have directed the Magistrate to pass fresh orders following the provisions of Section 202 of the Cr.P.C. Hence, we remit the matter to the Magistrate for passing fresh orders uninfluenced by the *prima facie* conclusion reached by the High Court that the bare allegations of cheating do not make out a case against the accused for issuance of process under Section 418 or 420 of the I.P.C. The C.J.M. will pass fresh orders

after complying with the procedure laid down in Section 202 Cr.P.C., within two months from the date of receipt of this order.

The special leave petition is, accordingly, disposed of.

(NARENDRA PRASAD)
COURT MASTER

(RENUKA SADANA)
COURT MASTER



JUDGMENT