

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1344 OF 2010

Shri Bansilal S. Kabra Applicant.

V/s

Global Trade Finance Ltd & Anr. Respondents.

Mr. Shirish Gupte, Senior Counsel with Mr. Arun H. Mehta & Ms Sonali Patil, Mr. Mubin Solkar i/b Akshar Law for the applicant.

Mr. Yashpal Thakur i/b Paras Kuhad & Associates for Respondent No.1.

Mrs R. V. Newton, APP for the State.

CORAM: V. M. KANADE, J.

DATE : 9th July, 2010

P.C.:-

1. Applicant has filed this application under section 482 of the Criminal Procedure Code for quashing the issuance of process by the learned Magistrate, 12th Court, Bandra, Mumbai in a complaint filed by Respondent No.1 under section 138 of the Negotiable Instruments Act, 1881.

2. The learned Counsel appearing on behalf of the applicant has challenged the order of issuance of process on various grounds. It is inter alia urged by the learned Counsel appearing on behalf of the applicant that the applicant is residing out of the jurisdiction of the the Court of Metropolitan Magistrate, 12th Court, Bandra, Mumbai and, as such, the learned Magistrate was duty bound to follow the procedure laid down under section 202 sub-clause (1) of the Criminal Procedure Code as amended by the Code of Criminal Procedure (Amended) Act 2005 (25 of 2005) which came into force with effect from 23/06/2006. He submitted that by virtue of the said amendment, the Magistrate in cases where accused is residing outside the jurisdiction of the Court, has a statutory obligation to postpone the issuance of process and to hold an inquiry before issuing

process. In support of the said submission, he has relied upon the judgment of the learned Single Judge of this Court (Brother S.C. Dharmadhikari, J.) in the matter of *Capt. S.C. Mathur & Anr. vs. M/s Elektronik Lab & Ors.*¹.

3. Since in large number of cases a similar ground was urged by the learned Counsel appearing on behalf of the applicants therein, all these matters were kept for the purpose of considering this issue more particularly in the context of cases under section 138 of the Negotiable Instruments Act and, accordingly, I have heard the learned Senior Counsel on either side on this point.

4. Mr. Gupte, the learned Senior Counsel appearing on behalf of one of the applicants has invited my attention to the judgment of the learned Single Judge of this Court in *Capt. S.C. Mathur's* case (supra) wherein the learned Single Judge of this court has held that the provision is mandatory. He also relied upon the judgment of the Apex Court in *K.T. Joseph vs State of Kerala & Anr*² It is, therefore, urged that the process which was issued without holding an inquiry as contemplated under the said section is liable to be quashed and the matter should be remanded to the Magistrate for holding fresh inquiry. The learned Senior Counsel took me through the judgment and order in the case of *Capt. S.C. Mathur's* case (supra). He reiterated the contentions raised by him in *Capt. S.C. Mathur's* case and urged that in view of the decision given by the learned Single Judge of this Court,

1 Judgment in Criminal Application No.2640 of 2009 with companion matters decided on 8th January, 2010

2 Criminal Appeal No.984 of 2009 (arising out of S.L.P. (Crl.) No.5734 of 2008)

the impugned order of issuance of process should be set aside.

5. Mr. Amit Desai, the learned Senior Counsel appearing on behalf of the Respondents in one of the cases, on the other hand, urged that taking into consideration the provisions of section 138 of the Negotiable Instruments Act, the said provision could not be said to be mandatory. He invited my attention to section 4 of the Criminal Procedure Code and submitted that sections 138 to 142 of the Negotiable Instruments Act is a self contained Code and if the said provisions are taken into consideration, this provision would fall within the exception to section 4 sub-clause (2). He urged that, therefore, so far as criminal cases under section 138 are concerned, it is not necessary to postpone the issuance of process and hold an inquiry again. He submitted that in a case under section 138, the Magistrate, before issuance of process, has to examine the ingredients of offence and for that purpose, it is always necessary to hold an inquiry again after examination of the complainant and his witnesses under section 200. It is submitted that while interpreting the said provision, it is necessary to refer to the doctrine of purposive interpretation and, for that purpose, objects and reasons of the amendment plus judgments of the Apex Court have to be taken into consideration. He invited my attention to the observations made by the Apex Court in respect of the amendment in which purposive interpretation was resorted

to by referring to certain paragraphs of the Judgment in *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. & Anr.*¹ He submitted that the provisions of section 4(2) of the Criminal Procedure Code were not considered by the learned Single Judge in *Cat. S.C. Mathur's* case (supra). In this context, he also referred to the judgment of the learned Single Judge (Brother D.B. Bhosale, J.) in *Peacock Industries Ltd. & Ors vs. Budhrani*², more particularly para 17.

6. Mr. Subhash Zha, the learned Counsel appearing on behalf of one of the complainants, has submitted that the learned Single Judge of the Kerala High Court has held that the provisions of section 202 sub-clause (1) are directory and not mandatory. He relied upon the judgment of the Kerala High Court in *Muhammed Basheer and etc. vs. The state of Kerala & Anr.*³ He also relied upon the judgment of the Madras High Court in *Prof. D. Kannammal vs. Tmt. Renuga Palanisamy*⁴. He further relied upon the judgment of Patna High Court in *Rakesh Singh & Anr. vs. State of Bihar & Ors.*⁵ He also relied upon the judgment of the Calcutta High Court in *Rameshwara Jute Mills Limited v. Sushil Kumar Daga & Ors.*⁶ and the judgment of the Apex Court in *Rosy and another vs. State of Kerala and others.*⁷ He then submitted that while interpreting the words used in the provision the court is required to take into consideration the entire statute

1 (2007) 6 SCC 528

2 2006(2) Bom.C.R. (Cri) 368

3 2009 CRI.L.J. 246

4 MANU/TN/9866/2007

5 2009 CRI. L.J.668

6 2009 CRI.L.J.2727

7 (2000) 2 SCCC 230

as also the objects and reasons of the amendment and has also to resort to the external aids for the purpose of interpretation and merely because the word “shall” is used in the provision the same could not be treated as a mandatory provision. In support of the said submission, he relied upon the following judgments.

Sr. No.	Name of parties	Citation
1.	Shashikant Sing v/s. Tarkeshwar Sing & Anr	(2000) 5 SCC 783
2	Ravi Vimal Krishna v/s. State of Bihar & Ors	(2003) 6 SCC 401
3	Modern School v/s. Shashi Pal Sharma & Ors	(2007) 8 SCC 489
4	Prakash Chand Maheshwari & Anr. v/s. The Zila Parishad, Muzaffarnagar & Ors.	(1971) 2 SCC 489
5.	Narayan Rao v/s State of Andhra Pradesh	AIR 1957 SC 737
6.	Central Bureau of Investigation v/s R.S. Pai & Anr.	(2002) 5 SCC 82

7. On the other hand, one another Counsel Ms. Kanani for the applicant, appearing in one of the cases, relied upon the judgment of the learned Single Judge of this Court (Nagpur Bench) in *Satish @ Rajendra s/o Harbans tiwari & Ors vs.*

*State of Maharashtra & anr*¹ wherein the learned Single Judge also had taken the view that the said provision is mandatory. My attention was also invited to the judgment of the learned Single Judge of this Court (Coram: Vishnu Sahai, J.) in *Ramesh Damodar Nagare vs. Ashok Damodar Nagare*².

8. I have heard the learned Counsel appearing on behalf of the applicants and the respondents at length. In order to consider the rival contentions raised by both parties, it would be necessary to take into consideration the relevant provisions of the Criminal Procedure Code. Though the relevant provision is the amended provision of section 202 sub-clause (1) of the Criminal Procedure Code and the question before this Court is whether the said provision is mandatory or directory, it would also be necessary to examine other provisions of the Criminal Procedure Code since the issue raised before this Court is pertaining to the interpretation of the said provision. Before, I refer to the provisions of Criminal Procedure Code, very briefly, the settled position in law in respect of interpretation of statute will have to be taken into consideration.

9 It is quite well settled that, normally, courts are supposed to give effect to the plain meaning to the words appearing in sections and provisions of the Act. However, in case of ambiguity and if a doubt arises in the mind of the court as to whether the provision is mandatory or directory,

1 Judgment in Criminal Writ Petition No.431 of 2009 decided on 7th June, 2010

2 Judgment in Criminal Revision Application No.147 of 1991 decided on 1/7/1997

the Apex Court has laid down various guidelines for the purpose of determination of the said question. It is, however, well settled that there is no universal rule or strait jacket formula for the purpose of coming to the conclusion whether the word or wording of the provisions has to be construed as mandatory or directory and, for that purpose, the court has to take into consideration the relevant word or wording of the said provision as also the other provisions of the Act as also various judgments of the Apex Court and High Courts, the objects and reasons of the Act or amendment and also assistance has to be taken of other external aids of construction. There are various judgments on either side which have construed the imperative language used in the provision as directory and not mandatory. Therefore, in my view, merely referring to some of the judgments of the Supreme Court on this issue regarding interpretation of the word "shall" alone may not be sufficient for the purpose of deciding whether the word is mandatory or directory. The Apex Court right from the judgment in *State of Uttar Pradesh and others vs. Babu Ram Upadhyia*¹ has accepted this proposition. SUBBA RAO J. has also observed as under:-

"For ascertaining the real intention of the Legislature",....."the court may consider *inter alia*, the nature and design of the statute, and the consequences which would follow from

¹ AIR 1961 SC 751

construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered”.

Similarly, CRAWFORD in his book “Statutory Construction” at page 516 has observed as under:-

“The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design,

and the consequences which would follow from construing it the one way or the other”.

Now the said proposition is quite well settled. Keeping in view the aforesaid guidelines laid down by the Apex Court, it will now be necessary to examine the various provisions of the Act and the amendment to Section 202 of the Cr.P.C.

10. So far as complaint under section 138 of the Negotiable Instruments Act is concerned, the same has to be filed before the Magistrate as a private complaint and the Magistrate can take cognizance of the complaint laid down in section 190 of the Criminal Procedure Code. After the complaint is filed, the Magistrate has to examine the complainant and his witnesses. Section 200 of the Criminal Procedure Code lays down the procedure of examination of the complainant and his witnesses. Section 200 of the Cr.P.C reads as under:-

“200. Examination of complainant.- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.”

The Magistrate, however, has an option which he can exercise before recording the statement of the complainant on oath and can direct investigation under section 156 of the Cr.P.C. In cases which are filed under section 138 of the Negotiable Instruments Act, however, the Magistrate does not have discretion to exercise this option since the question of investigation by the police in a complaint under section 138 does not arise. Therefore, after the complaint is filed, he has to record the statement of the complainant on oath or any of his witnesses if he finds it necessary to do so. In the event, he is not satisfied, he may postpone the issuance of process and the said procedure is laid down in section 202 of Cr.P.C. Section 202(1) of **Cr.P.C** before it was amended, was couched in the following words:-

“202. Postponement of issue of process.-

(1) Any Magistrate, on receipt of a complaint of an offence which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, 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 Sessions; 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 200."

Section 202(1) of the Cr.P.C., however, was amended by Criminal Procedure Code (Amendment) Act, 2005 (25 of 2005) which came into force with effect from 23/06/2006 and after amendment the second 202(1) reads as under:-

"202. Postponement of issue of process.-

(1) Any Magistrate, on receipt of a complaint of an offence which he is authorised to take cognizance or which has been made over to him under section 192, 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 Sessions; 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 200."

The said amendment was pursuant to the recommendation made by the Law Commission in its 41st report. The amendment with which we are now concerned pertains to insertion of following words viz. “and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction”. It would be relevant to consider the objects and reasons of this amendment and, in a nutshell, the said amendment was made since it was felt that false complaints were filed against the persons residing at far of places only for the purpose of harassing them and in order to see that these persons are not harassed the said words were added to make it obligatory upon the Magistrate to inquire into the case himself or direct investigation to be made by the police officer or any such person as he thinks fit. In a case under section 138 of the Negotiable Instruments Act, the question of directing investigation to be made by the police officer or any other person does not arise and, therefore, in respect of the complaint under section 138, the question is whether the said provision is a mandate given by the legislature to the Magistrate to again hold the second inquiry. In my view, taking into consideration the said provision of Cr.P.C with particular reference to sections 138 to 142 of the Negotiable Instruments Act, it cannot be said that the said provision is mandatory for the following reasons.

11. It will be necessary to briefly consider the provisions of sections 138 to 142 of the Negotiable Instruments Act. The

Negotiable Instruments Act was amended and the said provisions have been incorporated and the dishonour of cheque is now made a punishable offence subject to fulfillment of conditions laid down under the said provision. Section 138 of the Negotiable Instruments Act lays down as to when the dishonour of cheque becomes an offence. For the purpose of initiating complaint under section 138, certain conditions have to be fulfilled viz (i) drawer of the cheque should issue the cheque in favour of the payee, (ii) the said cheque has to be deposited by payee or holder in due course and, thereafter, if the said cheque is dishonoured then the payee or holder in due course has to give a statutory notice to the drawer asking him to make payment within stipulated time, (iii) if no such payment is made within the stipulated period after service of notice, the offence is said to have been committed by the said drawer and, after the prescribed period is over, a complaint can be filed before the Magistrate. In a case of vicarious liability, conditions mentioned in section 141 have to be complied with and, thereafter, cognizance can be taken by the Magistrate under section 142 of the Negotiable Instruments Act. The offence has to be tried as a summary case. The nature and scope of the entire trial is, therefore, very limited. Two provisions of the Negotiable Instruments Act raise presumption regarding issuance of cheque by the drawer; one is section 118 and other is section 139. Both these presumptions, however, are rebuttable and the accused can rebut these presumptions either by leading evidence or by cross-examining the

complainant and his witnesses. In view of the initial presumption under sections 118 and 139 of the Negotiable Instruments Act, task of the complainant in proving the prima facie case becomes very easy. He has to make necessary averments in the complaint for the purpose of establishing ingredients of the offence. Secondly, if he wants the person other than the drawer of the cheque to be made as an accused in the complaint he has to make necessary averments, annex the relevant documents such as bank memo of dishonour, the cheque in question, demand notice, acknowledgment receipt showing proof of service of demand notice. If necessary averments are made in the complaint coupled with the said documents, the Magistrate then can examine the complainant on oath for the purpose of ascertaining truthfulness or otherwise of the averments in the complaint. This procedure can be completed by the Magistrate while following the procedure under section 200 of the Criminal Procedure Code. This being the position, the question which remains to be seen is whether, again, a second inquiry is contemplated under section 202 and whether the Magistrate has any discretion to hold the inquiry or not to hold the inquiry.

12. In my view, though the word “shall” has been used in the amended provision of section 202(1) and it is followed after the word “may” which is used, that would not be the only criteria for the purpose of determining that the said provision as mandatory or directory. The purpose behind

incorporating the said provision in the amended section was to ensure that the learned Magistrate does not mechanically issue the process but applies his mind to the facts of the case to the averments made in the complaint to the statement made by the complainant and his witnesses under section 202 and, thereafter, if a doubt still remains in his mind, he can himself consider this by holding an inquiry in order to ascertain whether a prima facie case is made out or not against the accused who are residing beyond the jurisdiction of the Magistrate. The intention of the legislature appears to be to ensure that if the Magistrate feels it necessary some further home work should be done by him since the consequences of issuance of process in the mechanical manner can entail disastrous consequences upon the accused who is residing at far a of place. The inquiry, therefore, in my view, which has to be made in a complaint which is filed under section 138 itself is very limited to certain documents and averments in the complaint. It cannot be said that in each and every case, the Magistrate after recording the statement of the complainant and his witnesses should again postpone the issuance of process and again hold a fresh inquiry by asking the complainant to adduce further evidence. If such an interpretation is made, it would defeat the very purpose for which the provisions of section 138 have been incorporated in the Negotiable Instruments Act.

13. Section 143 of the Negotiable Instruments Ac itself lays

down that the trial has to be completed within a period of six months. Subsequent amendment which has been made to the provisions of section 138 and the objects and reasons of the said amendment are seen, it would reveal that idea for amending the said provision is to curtail the time taken in completing the trial. Therefore, if it is held that the said provision is mandatory requiring inquiry by the Magistrate himself since there is no question of inquiry by the police or any other person, would lead to duplication of work and consequently it would prolong and protract the disposal of the case. In a given case, however, the Magistrate, if he finds that necessary material which is to be produced by the complainant has not been brought on record, he may exercise his discretion and postpone the issuance of process and examine legal as well as factual issue and then after holding a further inquiry and after further application of mind may decide whether complaint has to be dismissed under section 203 of the Criminal Procedure Code. In my view, this appears to be the intention of the legislature, particularly because no corresponding amendments have been made by the legislature to other provisions of the Criminal Procedure Code viz sections 460, 461 and 465 of the Criminal Procedure Code. Sections 460 and 461 specifically lay down irregularities which are committed during trial. The said section 460 lays down irregularities which can be cured and section 461 lays down irregularities which cannot be cured. Section 465 specifically starts with non-obstante clause and states that merely because there is

some irregularity committed during trial, the same will not vitiate the judgment given by the Trial Court. The legislature, therefore, while amending section 202(1) of the Criminal Procedure Code did not think it fit and proper to amend sections 460 and 461 of the Criminal Procedure Code and, therefore, that would be another indication to know the intention of the legislature. If the intention of the legislature was to make that irregularity a serious one, it would have enumerated it in section 461 of the Criminal Procedure Code. Therefore, though the word “may” used in the amended section 202(1) is followed by the word “shall”, the context in which the said word “shall” has been used, has to be taken into consideration.

14. There are number of statutes wherein a private complaint has to be filed. Various Acts such as Companies Act, Factories Act, Food and Drugs Act, Drugs and Cosmetics Act, Food Adulteration Act have made certain acts punishable and, for that purpose, private complaint has to be filed. In many of these offences, non-compliance of a particular procedure entails penal consequences. For example, non-maintaining the registers, non-filing of returns etc. In all such cases if issuance of process is postponed merely on the ground that the accused is residing outside the jurisdiction of the court even if the relevant documents are produced and statement of the complainant is made on oath at the time of verification under section 200 then the second inquiry would be a futile exercise of repeating the

same thing again. Obviously, this was not the intention of the legislature when it provided that there would be postponement of issuance of process in cases where the accused are residing outside the jurisdiction of the Court. The legislature intended that there should be proper application of mind on the part of the Magistrate before coming to the conclusion that prima facie case is made out by the complainant. It will be necessary to consider various judgments given by the Apex Court, other High Courts and the judgment given by my brother S.C. Dharmadhikari, J. on this point.

15 The Apex Court in *Rosy and another vs. State of Kerala and others*¹ had an occasion to consider the provisions of section 202(2) and, in that context, it considered the provisions of section 200, 202 and also provisions of section 460 to 466 of the Criminal Procedure Code. The said case was heard by Division Bench comprising of K.T. Thomas and M.B. Shah, JJ. In this case, against the order of the High Court, a criminal appeal was filed. The Apex Court, in the said case, while deciding the issue raised in the said criminal appeal was pleased to take into consideration various provisions of the Code of Criminal Procedure and the main question which fell for consideration before the Apex Court in the said case was in respect of interpretation of the proviso to section 202 sub-clause (2). Here in this case, admittedly, the case was committed by the learned Magistrate to the Sessions Court. The Apex Court was called upon to consider

¹ (2000) 2 SCC 230

the provisions in the proviso to section 202(2), requiring the Magistrate to hold an inquiry in cases exclusively triable by the Sessions Court. While deciding the said issue, M.B. Shah, J. held that the said provision was discretionary and omission to follow it would not vitiate further trial unless it was established that the prejudice was caused to the accused. K.T. Thomas, J., however, held that the provision is mandatory but the omission to follow it by itself would not vitiate the proceedings and if objection was raised at a belated stage, the decision has to be taken in the light of section 465 of the Criminal Procedure Code. Both the Hon'ble Judges, however, came to the conclusion that the order passed by the High Court was incorrect and, therefore, directed the Sessions Court to dispose of the case on merits and in accordance with law. M.B. Shah, J. has made the following observations in para 17 and 18 of the judgment:-

"17. At the initial stage, if the objection is raised and it is found by the Sessions Court that by non-holding of inquiry, prejudice is caused to the accused, he may direct the Magistrate to follow the procedure prescribed under the proviso. It is no doubt true that by the use of the word "*shall*", it appears that the language used in the proviso is of a mandatory nature. At the same time, it is procedural law and it is to be read in the context of Section 200 which enables the Magistrate to issue process without holding any inquiry and that inquiry under Section 202 is itself a discretionary one – *giving the option to examine or not to examine witnesses on oath*. Hence, the proviso to the said sub-section is required to be read accordingly

though couched in mandatory terms by using the word “*shall*”. Normally, the procedure prescribed therein should be followed, but non-observance of the said procedure may not vitiate further proceedings in all cases. In a case where a complaint is filed not by the public servant and where the offence is exclusively triable by the Court of Sessions, the Magistrate should follow the proviso to sub-section (2) of section 202 and call upon the complainant to produce all his witnesses and examine them on oath.....”

“18.Sub-section(2) further provides that in determining whether any irregularity in proceedings has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. Hence, the statute does not expressly provide for nullification of the order as a consequence of non-compliance with the proviso to sub-section (2) of Section 202, but provides that unless prejudice is caused, the order is not to be set aside. This would mean that during inquiry under Section 202 when the Magistrate examines the witnesses on oath, as far as possible the proviso is to be complied with but the mandate is not absolute.”

After considering the provisions of section 460 and 461 of the Cr.P.C., M.B. Shah, J. has observed, after referring to section 465 that the said interpretation would be in consonance with the said proviso. M.B. Shah, J. has referred to the judgment of the Supreme Court in *State of Punjab vs. Shamlal Murari*¹ and the observation made in para 8 of the said judgment has been quoted. In my view, these

¹ (1976) 1 SCC 719 : 1976 SCC (L&S) 118

observations are relevant for the purpose of deciding the controversy in issue and, therefore, para 19 of the said judgment is also reproduced hereinbelow:-

“19. This is also to be considered with the fact that this part of holding an inquiry is a procedural one and for that purpose, it would be proper to refer to the observation made by this Court in *State of Punjab v. Shamlal Murari*¹ (SCC p.722, para 8)

“We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, tho’ procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, courts are to do justice, not to wreck this end product on technicalities. Viewed in this perspective, even what is regarded as mandatory traditionally may, perhaps, have to be modernated into wholesome directions to be complied with in time or in extended time.” “

1 (1976) 1 SCC 719 : 1976 SCC (L&S) 118

K.T. Thomas, J., after referring to section 465 of the Criminal Procedure Code has observed that one of the tests to ascertain whether the omission has occasioned failure of justice is incorporated in sub-section (2). If objection is not taken earlier the court cannot permit the party to raise it at the last stage. Thereafter, having noticed the provisions of sections 200 and 202, K.T. Thomas, J. has observed that proviso incorporated is not merely to confer discretion on the Magistrate, but a compelling duty on him to perform in such cases. In para 48, however, it is observed that if no objection is taken at an earlier stage, regarding such omission, the Court can consider how far such omission would have led to miscarriage of justice, when such objection is taken at a later stage and a decision on such belated objection can be taken by bearing in mind the principles adumbrated in Section 465 of the Code.

16. So far as judgment in Rosy (*supra*) is concerned, it is no doubt true that the issue involved in the said decision was slightly different from the issue involved in the present case. In the said case, since the case was admittedly triable by the Court of Sessions, the Magistrate did not have power to order further investigation. However, once the Magistrate came to the conclusion that the offence complained of was exclusively triable by the Court of Sessions, the said proviso provides that he shall call upon the complainant to produce all his witnesses and examine them on oath. However, the analogy on which the said decision is based in the said case

would be certainly relevant for the purpose of deciding the issue in this case viz. whether the amendment is mandatory or directory and on the same analogy, therefore, it is observed by M.B. Shah, J. with reference to sections 200, 460 and 461 that the amendment in question will have to be held as directory and not mandatory. He has further observed that though the word “shall” is used in the said proviso, it would still not vitiate the order passed by the Magistrate and it would depend on the time when the objection was raised and whether prejudice was caused to the accused by non-compliance of the order.

17. It is no doubt true that one of the tests for determining the question whether the provision is mandatory or directory is to construe the words preceding imperative word “shall” and if the word “may” is followed by the word “shall” then in such cases, ordinarily it would mean that direction given in the sentence beginning with the word “shall” has to be necessarily complied with. However, that cannot be the only test of interpretation since there is no universal rule regarding interpretation of the provision.

18. In this context, therefore, it would be relevant to refer to the judgments of the other High Courts. The Kerala High Court in *Muhammed Basheer v. The State of Kerala*¹ wherein the similar issues was involved, has observed that non-compliance does not vitiate the cognizance taken and consequent issuance of process. The Kerala High Court in

¹ CDJ 2008 Ker HC 586

para 30 of its judgment has observed as under:-

“30. Even in a prosecution under section 138 of the Negotiable Instruments Act there may be circumstances when the learned Magistrate after alertly applying his mind may need further materials and in all such circumstances, the Magistrate can and must proceed to conduct an enquiry under section 202 Cr.P.C. Where there is possible dispute about territorial jurisdiction or where complicity is sought to be imposed with the aid of S.141 Cr.P.C, the Court may ordinarily be justified, if no sufficient materials are not already available, in proceeding to the enquiry under Section 202 Cr.P.C. The crucial question is whether the requisite satisfaction can be entertained after completion of the enquiry at the stage of Section 200 Cr.P.C. If the learned Magistrate is not so satisfied, he must proceed to conduct the enquiry under Section 202 Cr.P.C. In the light of the amendment of Section 202 Cr.P.C., in respect of that class of persons – those who reside outside the jurisdiction of the court, pointed application of mind must be made by the Magistrate to satisfy himself whether there is sufficient ground for proceeding or not. If the learned Magistrate is satisfied that such satisfaction can be entertained, the enquiry under section 202 Cr.P.C can be dispensed with. Superior courts will not interfere with the discretion exercised by the Magistrate at that stage merely because a ritualistic enquiry under

Section 202 Cr.P.C has not been undertaken. But in a case where the court is satisfied that sufficient materials are not there, certainly cognizance taken can be faulted and the matter can be sent back to the Magistrate for conducting enquiry under Section 202 Cr.P.C.”

19. The Calcutta High Court in *Rameshwar Jute Mills vs. Sushil Kumar Daga & Ors*¹ in para 69, 72, 74 has observed as under:-

“69. The language of Section 202 as amended cannot be stretched or extended to such a degree which in its turn may defeat the very purpose for which Chapter XV of the Code is incorporated. There is nothing to show in the language of Section 202 of the Code, as originally framed, or even after amendment, that the same overrides the provision of Section 200 of the Code and the Magistrate, in view of amended provision of Section 202, is compelled to postpone issue of process under Section 204 or to dismiss the complaint under Section 203 of the Code. In other words the language of amended provision of Section 202 cannot be read in such a way separating it altogether from the language of Section 200 and Section 203. There is nothing in Section 202 or in the amended provision which controls the language of Section 200 of the Code. The amendment was effected and applies only in cases where the issuance

1 2009 CRI L.J.2727

of process against the accused persons are postponed by the learned Magistrate.”

“72. The language of the original Section using the word ‘may’ is not changed by the subsequent amendment effected under Act 25 of 2005. The discretion to enter within the purview of Section 202 of the Code still remains with the Magistrate. If the learned Magistrate does not think it fit to enter into an inquiry within the purview of Section 202 of the Code and decide the matter after considering the evidence under Section 200 of the Code then in my view no illegality can be said to have been committed by the learned Magistrate. In other words I am not in agreement with the submission that in view of the amendment of Section 202, it is compulsory on the part of the Magistrate to make necessary inquiry under Section 202 after examining the witness under Section 200 of the Code.”

“74. The legal position as highlighted above is clearly indicative that postponement of issue of process under Section 202 is not compulsory and still remains at the discretion of the Magistrate.”

Similarly the Calcutta High Court, in the said case, in para 70 has observed as under:-

“70. It may be pointed out that postponement of issue of process by the Magistrate is not mandatory or

obligatory. The language of Section 202 as originally framed used the word, 'may', if he thinks fit. This language of Section 202 clearly indicates that Magistrate has discretion to enter into the field of Section 202 and there is no compulsion on the part of the Magistrate that he must enter into the field of Section 202 after recording the evidence under section 200 of the Code."

Then the Calcutta High Court, in the said case, in paras 81 and 82 has mentioned the consequence of non-compliance and the said paragraphs read as under:-

"82. I have already pointed out that the application of Section 202 is discretionary and when the law has not demanded or make it obligatory on the part of the Magistrate to enter into such inquiry as provided under Section 202 then in my view non-compliance of the same cannot and does not call for any interference. If the learned Magistrate has not exercised his discretion or did not think it necessary to enter into further inquiry in terms of Section 202 then there is no language either in Section 200 or Section 202 which compels him to do so."

Finally, in para 88 of the said judgment, the Calcutta High Court has answered the scope and object of section 202 and the said paragraph reads as under:-

“88. In view of my above discussion, the issuance as to scope and object of amended provision of section 202 is answered as follows :

1. The application of Section 202 of the Code is discretionary and the same will come into operation only in cases where the Magistrate in his discretion decides to postpone the issue of process
2. In cases where the learned Magistrate postpones the issue of process then it is mandatory on his part to inquire in case of accused persons, who are residing outside the jurisdiction of the Court.”

20. The Madras High Court in *Prof. D. Kannammal vs. Tmt. Renuga Palanisamy*¹ in paragraphs 10 and 11 has held that the amended provision contained in section 202(1) may not apply in respect of cases filed for the offence punishable under section 138 of the Negotiable Instruments Act. I am, therefore, fortified in my view by the judgments of Kerala High Court, Calcutta High Court and the Madras High Court.

21 It would also be relevant to take into consideration the observations made by the Apex Court in *M/s Mandvi Co-op Bank Ltd. vs. Nimesh B. Thakore*² in relation to proceedings under section 138. Though the issue before the Court was in respect of provisions of section 145 of the Negotiable Instruments Act, the Apex Court took into consideration the

¹ MANU/TN/9866/2007

² 2010 ALL MR (Cri) 599 (S.C.)

provisions of Negotiable Instruments Act for the purpose of interpreting the said provision and has observed in paragraphs 17 and 18 of its judgment as under:-

“17. It is not difficult to see that sections 142 to 147 lay down a kind of a special code for the trial of offences under Chapter XVII of the Negotiable Instruments Act and sections 143 to 147 were inserted in the Act by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to do away with all the stages and processes in a regular criminal trial that normally cause inordinate delay in its conclusion and to make the trial procedure as expeditious as possible without in any way compromising on the right of the accused for a fair trial.”

“18. Here we must take notice of the fact that cases under section 138 of the Act have been coming in such great multitude that even the introduction of such radical measures to make the trial procedure simplified and speedy has been of little help and cases of dishonoured cheques continue to pile up giving rise to an unbearable burden on the criminal court system.....”

22. While interpreting the provisions of section 202 Cr.P.C., therefore, the provisions of Negotiable Instruments Act also have to be taken into consideration and if it is so done, in my view, it would reveal that though the legislature has used the word “shall” in the said amendment, it cannot be

treated as mandatory direction but a directory one and the discretion would vest in the Magistrate to consider where in cases the accused resides outside his jurisdiction, whether it is necessary to postpone the issuance of process or not, depending on facts of each case. Mr. Shirish Gupte, the learned Senior Counsel appearing on behalf of the accused has invited my attention to the judgment of the Apex Court in K.T. Joseph (supra)

23 In my humble view, the said judgment of the Apex Court in K.T. Joseph's case (supra) does not consider the said issue and, therefore, the said judgment cannot be relied upon for the proposition canvassed by the learned Senior Counsel. It will be necessary to reproduce the said judgment from para 2 onwards:-

"2. A small issue relating to the transfer of the proceedings in CC 1290 of 2008 on the file of learned Additional Chief Judicial Magistrate, Ernakulam forms the foundation for these proceedings. By an order in Criminal Revision Petition no.1858 of 2008 a learned Single Judge directed transfer of the case to the Chief Judicial Magistrate, Ernakulam. Certain observations were made against the Judicial Officer and his conduct. Learned Single Judge has observed that after the amendment to Section 202 of the Code of Criminal Procedure, 1973 (in short the 'Code') with effect from 23.6.2006 by Central Act 25/2005 it is

mandatory on the part of the learned Magistrate to conduct an enquiry under section 202 of the Code. Learned Single Judge noted that the Magistrate had emphasized that he was considering the complaint at the pre-cognizance stage which according to him was not correct. By deciding to examine the complainant and the witnesses under Section 202 of Code, the Magistrate had already taken cognizance of the offence and he was not considering the sworn statements of the witnesses at the pre cognizance stage. Learned Single Judge felt that enquiry was mandatory after 23.6.2006.

3. The legal position is unexceptionable.

4. In the background facts we do not think that any exception can be taken to the transfer as directed by learned Single Judge. The observations regarding the conduct are unnecessary and stand deleted. Learned Single Judge has directed that the Chief Judicial Magistrate shall have discretion to record further sworn statements if necessary in case he decides to take cognizance of the offence. The aforesaid observations and directions are also in order.

5. The appeal is accordingly disposed of."

In this case the order of transfer passed by the learned Judge

was challenged as also observations made in the said order regarding the conduct of the Trial Court. Here the issue was relating to transfer of the proceedings and the learned Judge directed transfer of the case to the Chief Judicial Magistrate, Ernakulam. After making some reference in para 2 to the facts of the case, the Apex Court in para 3 merely observed that the legal position is unexceptional and, thereafter, confirmed the order of the learned Judge and the observations made by the learned Judge regarding conduct of the Judicial Officer were deleted. The issue whether provisions of section 202(1) are mandatory or directory was not the subject matter of the case before the Apex Court. In my humble view, therefore, it cannot be said that the said judgment is a binding precedent.

24. It is quite well settled that a judgment is what it decides and if the facts in the said case are different, the said judgment cannot be considered as a binding precedent. The Apex Court in *Zee Telefilms Ltd. and another vs. Union of India and others*¹ has observed in paras 254, 255 & 256 as under:-

"Precedent

254. Are we bound hands and feet by Pradeep Kumar Biswas (2002) 5 SCC 111? The answer to the question must be found in the law of precedent. A decision, it is trite, should not be read as a statute. A decision is an authority for the questions of law determined by it.

¹ (2005) 4 SCC 649

Such a question is determined having regard to the fact situation obtaining therein. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment, as is well known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it. (See *Punjab National Bank v. R.L. Vaid* (2004) 7 SCC 698).

255. Although decisions are galore on this point, we may refer to a recent one in *State of Gujarat v. Akhil Gujarat Pravasi V.S. Mahamandal* (2004) 5 SCC 155 wherein this Court held : (SCC p. 172, para 19)

"It is trite that any observation made during the course of reasoning in a judgment should not be read divorced from the context in which it was used."

256. It is further well settled that a decision is not an authority for a proposition which did not fall for its consideration. It is also a trite law that a point not raised before a court would not be an authority on the said question. In *A-One Granites v. State of U.P.* (2001) 3 SCC 537 it is stated as follows : (SCC p. 543, para 11)

"11. This question was considered by the Court of Appeal in *Lancaster Motor Co. (London) Ltd. v. Bremith Ltd.* (1941) 1 KB 675 and it was laid down that when no consideration was given to the question, the decision cannot be

said to be binding and precedents sub silentio and without arguments are of no moment"

[See also *State of U.P. v. Synthetics and Chemicals Ltd.* (1991) 4 SCC 139, *Arnit Das v. State of Bihar* (2000) 5 SCC 488 (SCC para 20), *Bhavnagar University v. Palitana Sugar Mills (P) Ltd.* (2003) 2 SCC 111, *Cement Corpn. of India Ltd. v. Purya* (2004) 8 SCC 270, *Bharat Forge Co. Ltd. v. Uttam Manohar Nakate* (2005) 2 SCC 489 and *Kalyan Chandra Sarkar v. Rajesh Ranjan* (2005) 2 SCC 42, See para 42.]"

25. So far as the submissions made by Mr. Amit Desai, the learned Counsel appearing on behalf of the complainant that the provisions of section 4(2) of the Cr.P.C would apply in respect of the provisions of the Negotiable Instruments Act are concerned, the said submissions, in my view, cannot be accepted. It is no doubt true that some of the provisions of the Negotiable Instruments Act start with non-obstante clause. However, that by itself would not protect the said provision under sub-clause (2) of section 4 of the Cr.P.C.

26. So far as the judgment in *Capt. S.C. Mathur* (supra) is concerned, I respectfully, disagree with the said view for the reasons mentioned hereinabove. For the same reasons, I also respectfully disagree with the observations made by the learned Single Judge of the Nagpur Bench of this Court in *Satish & Rajendra s/o Harbans Tiwari* (supra)

27. So far as the judgments on which reliance is placed by Shri Zha the learned Counsel for the complainant on the question of interpretation of the words “may” and “shall” viz. *Shahshikant Singh vs. Tarkeshwar Singh & Anr.*¹, *Ravi Vimal Krishna & Ors vs. State of Bihar & Ors.*², *Modern School vs. Shashi Pal Sharma & Ors.*³, *Prakash Chand Maheshwari & Anr. vs. The Zila Parishad, Muzaffarnagar & Ors.*⁴, *Narayan Rao vs. State of Andhra Pradesh*⁵ are concerned, in all these judgments also the Apex Court, after taking into consideration the relevant words in the sections, provisions in the statute, objects and reasons, has accordingly held that use of the word “shall” in a provision does not necessarily make it a mandatory one. In my view, it is not necessary to refer to these individual judgments since the Apex Court has considered these cases after examining relevant provisions and, therefore, there cannot be any universal rule for the purpose of interpreting a particular word or sentence in the section.

28 For the aforesaid reasons, therefore, I am of the view that the said provision may not apply to the provisions of Negotiable Instruments Act and merely because the accused reside outside the jurisdiction of the court, in each and every case it is not necessary for the Magistrate to postpone the issuance of process. The Magistrate, in my view, can exercise his discretion and decide whether to issue process,

1 (2000) 5 SCC 783

2 (2003) 6 SCC 540

3 (2007) 8 SCC 540

4 (1971) 2 SCC 489

5 AIR 1957 SC 737

dismiss the complaint after recording the verification of the complainant and his witnesses, if any, or postpone the issuance of process and in a given case hold a further inquiry, depending on facts and circumstances of each case and non-compliance of the said provision would not vitiate the issuance of process if there is material to indicate that there has been an application of mind on the part of the Magistrate after going through the verification and other material brought on record by the complainant.

29. In my view, judicial discipline and propriety demands that in the event of difference of opinion between the Judges of the same High Court on any legal issue, the matter should be placed before Hon'ble the Chief Justice.

30. In the present case, large number of applications have been filed under section 482 of the Criminal Procedure Code, alleging non-compliance of the provisions of section 202 and a relief is claimed that the process issued by the Magistrate may be quashed. If there are conflicting judgments of the same High Court, it would create uncertainty in the mind of the learned Magistrate regarding course of action which has to be followed by him and, therefore, in my view, this is an important issue which needs to be finally resolved by the Division Bench or larger Bench of this Court.

31. Office is directed to place the judgment and order of this Court before Hon'ble the Chief Justice.

(V.M. KANADE, J.)