
(2010) 09 BOM CK 0030

In the Bombay High Court

Case No : Criminal Writ Petition No. 67 of 2009

Anurag Intex (Chem) Pvt. Ltd.

APPELLANT

Vs

Meta Mines and Minerals (P) Ltd. (formerly Vaidehi Engineering Pvt. Ltd.) Near Upasnagar, Post Zuarinagar, Goa and Public Prosecutor, State of Goa, Panaji-Goa

RESPONDENT

Date of Decision : 06-09-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 138, 200, 202, 203, 204
Negotiable Instruments Act, 1881 (NI) — Section 138, 145

Citation : (2010) 09 BOM CK 0030

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : S.G. Dessai and Mr. Pavitrans A.V, for the Appellant; E.O. Mendes, Advocate for Respondent No. 1 and Shri C.A. Ferreira, Public Prosecutor, for the Respondent

Judgement

N.A. Britto, J.—Heard. This petition filed u/s 482 of the Code (Code of Criminal Procedure, 1973) is directed against Order dated 12-8-2009 of the learned J.M.F.C., Panaji, by which process was issued against the petitioner u/s 138 of the Negotiable Instruments Act, 1881.

2. At the hearing of this petition, two submissions have been made by Shri S. G. Dessai, learned Senior Counsel appearing on behalf of the petitioners/accused.

3. The first is that process was issued against the accused without examining the Complainant and only on the basis of an affidavit filed on behalf of the Complainant. The second submission is that the learned J.M.F.C. was required to conduct an inquiry in terms of the amended provision of sub-section(1) of Section 202 of the said Code as the petitioner/accused were residing outside the jurisdiction of the learned J.M.F.C.

4. As regards the first submission and to support the same, reliance has been placed on a Judgment of this Court in the case of Kedar Kakodkar v. Auduth

Timblo(2008 (2) Goa L.R. 531).

5. Shri E. O. Mendes, learned Counsel appearing on behalf of Respondent No. 1/ Complainant submits that the usual procedure followed by the learned J.M.F.C. at the time of issuing of process against the accused was followed in this case as well by filing an affidavit which according to the learned Counsel is otherwise contemplated u/s 145 of the Negotiable Instruments Act, 1881.

6. The provision of Section 145 of the Negotiable Instruments Act, 1881, which deals with taking evidence on affidavit in a case filed u/s 138 of the said Act is quite different from the procedure prescribed by Section 200 of the Code which requires the Magistrate to examine the Complainant on oath and the witnesses, if present. One casts a duty on the Magistrate and the other gives a right to the accused.

7. This Court by Judgment dated 27-4-2006 in Criminal Writ Petition No. 6 of 2005 in the case of Mr. Shailesh H. Bajaj v. Sesa Goa Limited and another, after making reference to various decisions of the High Courts in relation to Section 200 of the Code had observed that the object behind Section 200 of the Code was two fold. First, it is to safeguard innocent people. It is necessary for the Magistrate to satisfy himself by recording the statement on oath of the complainant to find out the credibility of the complaint and take a decision thereon as regards the issuance of process. Second, to find out the seriousness of the offences so that if necessary police could be ordered to investigate the same and submit a report. It was further observed that the word "shall" casts an imperative duty to be performed by the Magistrate and that cannot be abdicated in favour of the advocate of the complainant. It was further held that no process can be issued based on examination in chief, for it cannot be relied upon except in exceptional situations, unless it is completed by cross-examination and re-examination. It was further held that the word "examination" has been used in Section 200 of the Code which means that the Magistrate is obliged to put questions to such complainant and to elicit the answers from him. The Section enjoins a judicial duty to be performed and it requires application of judicial mind while examining such Complainant on oath.

8. In the case of Lance Irwin Lobo(Capt.) v. Ismail D'Souza and another(2007(1) Bom C.R.(Cri.) 680) it was observed that a conjoint reading of Sections 203/204 Cr.P.C. shows that process is to be issued after considering the statement on oath of the Complainant and of the witnesses and the result of the inquiry or investigation, if any, u/s 202, and that the recording of the statement on oath of the Complainant u/s 200 Cr.P.C. is not an empty formality. It was further observed that commonly it is nicknamed as verification. To verify means to establish the truth. In other words, verification is done in order to ascertain as to what is pleaded by the Complainant is true or not. It is with a view to separate chaff from the grain as many a times complaints do contain unfounded allegations and it is the duty of the Court to ensure that what is stated in the complaint is also stated by the Complainant on oath and it is only then that

based on such statement that process can be issued. The corollary of this would be that unless offences are disclosed from the statement on oath, no process can be issued only based on averments in the complaint. The Complainant is bound to make a statement on oath as to how the offence was committed and how the accused persons are responsible therefor. After the statement on oath is recorded, a Magistrate is required to apply his judicial mind to the facts of the case and the law applicable thereto and find out what offence/s is made out, notwithstanding that the other party at that stage is unrepresented.

9. Now the Division Bench in *Maharaja Developers and another v. Udaysingh Pratapsinghrao Bhonsle and another* (2007 ALL MR (Cri) 1339) agreeing with the view held by Kerala High Court in *N. Harihara Iyer Vs. State of Kerala*, has held that:

From the above discussion, we are of the considered view that the non-obstante clause in Section 142 or 145 of the N.I. Act does not override the provisions of Section 200 of Cr.P.C. and it is mandatory for the Magistrate to examine the complainant who has filed the same u/s 138 of the N.I. Act though with an affirmation as regards truthfulness of the contents of the complaint. It, therefore, follows that the Magistrate is obliged and duty bound to examine upon oath the complainant and his witnesses before issuance of process u/s 204 of Cr.P.C. though there is a solemn affirmation at the foot of the complaint by the complainant.

10. The Judgment of the Division Bench in *Maharaja Developers and another v. Udaysingh Pratapsinghrao Bhonsle and another* (supra) has been followed in *Kedar Kakodkar v. Auduth Timblo* (supra).

11. Examination of the Complainant on oath is the duty of the Magistrate and that cannot be performed either through advocate or by allowing the party to file an affidavit. Since the process was issued by learned J.M.F.C. without examining the Complainant on oath as required u/s 200 Cr. P.C., process issued against the accused is bound to be set aside.

12. As regards the second submission, I have no doubt in my mind that the learned Magistrate would consider the same if there is an occasion for issuing of process since it is submitted that the amended provision of Section 202 came into force on 23-2-2006, and the complaint was filed on 2-4-2009.

13. In view of the above, the petition succeeds. The process issued against the accused is hereby set aside. The Complainant to remain present before the learned J.M.F.C. on 30-9-2010 for further proceedings.

14. Shri Mendes submits that this Judgment be circulated, so as to avoid inconvenience to the parties, as the Complainant in a given case would not mind, the Complainant being examined on oath by the learned Magistrate. Registry to circulate this Judgment, to all Judicial Officers in the State of Goa as the Division Bench Judgment was not circulated in the State of Goa.