(2017) 12 BOM CK 0094

In the Bombay High Court

Case No : 997 2017

Girish Dharmchand Chordiya(Jain) APPELLANT

Vs

Neeta Sachin Chandak, Ors RESPONDENT

Date of Decision : 06-12-2017

Acts Referred:

Constitution of India, Article 227 - Power of superintendence over all courts by the High Court
Code of Criminal Procedure, 1973, Section 202 - Postponement of issue of

Citation : (2017) 12 BOM CK 0094

Hon'ble Judges : Prakash D.Naik

Bench : SINGLE BENCH

Advocate : M.K. Bhosale, P.V. Barde, A.A. Jagatkar

Judgement

1. The petitioner has invoked the supervisory jurisdiction, under Article 227 of the Constitution of India and challenged the Judgment and order dated 6th May, 2017, passed by the Learned Additional Sessions, Judge, Aurangabad in Criminal Revision petition No. 84 of 2017, confirming the order dated 16th November, 2016, passed by Judicial Magistrate, First Class, Aurangabad in Summery Criminal Case No. 8509 of 2016.

2. The factual matrix of the matter is as under : (a) Respondent No.1 filed a complaint viz Summary Criminal Case No. 8509 of 2016, before the Court of Judicial Magistrate, First Class, Aurangabad. In the complaint, it was alleged that in the year 2014, the accused requested the complainant to start a business of Tours and Travels and Money Exchange in partnership at Aurangabad and demanded Rupees Ten Lakhs with understanding that partnership deed will be executed in between him and the complainant. Accordingly, complainant paid Rupees Ten lakhs to the accused.

(b) On the pretext of taking franchisee of Heena Tours, accused again demanded an amount of Rupees Ten Lakhs towards deposit to Heena Tours. Relying on the assurance, the complainant paid an amount of Rupees Ten Lakhs to the accused on second occasion. Thereafter, again on pretext of bulky booking in tours and travels took Rupees Four Lakhs from the complainant with assurance to return it within fifteen days. It is further alleged that the accused issued cheque of Rs. 20,00,000/(Rupees Twenty Lakhs) as part payment out of Rs. 30,00,000/(Rupees Thirty lakhs) given by the complainant to the accused and Rs.6,00,000/(Rupees Six Lakhs) as benefit of her share out of joint business of Tours and Travels.

(c) The complainant presented three cheques for its realization, which were returned unpaid on the ground that funds were insufficient and Account Closed. Demand notice was issued by the complainant on 9th September, 2016. On failure to make the payment, the complainant filed the complaint on 25.10.2016 for the offence punishable under Section 138 of the Negotiable Instruments Act.

3. The trial Court vide order dated 16th November, 2016, issued process against the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act.

4. The petitioner challenged the aforesaid order by preferring Criminal Revision Petition No. 84 of 2017, before the Court of learned Additional Sessions Judge, Aurangabad on 1st April, 2017. The said Revision Application was rejected vide order dated 6th May, 2017.

5. The learned Advocate for the petitioner challenged the proceeding on the sole ground that before issuing process, the learned Magistrate failed to follow mandatory provisions of Section 202 of the Code of Criminal Procedure. It is submitted that accused was resident of Nashik and the complaint is filed in the Court of Judicial Magistrate, First Class, Aurangabad. Since the accused was residing beyond the jurisdiction of the trial Court, it was mandatory for the Court to conduct enquiry under Section 202 of the Code of Criminal Procedure. It is submitted that on account of failure to take recourse to Section 202 of the Code of Criminal Procedure, which was mandatory, the order issuing process passed by the Trial Court is bad in law and deserves to be quashed and setaside. It is submitted that, the trial Court as well as Sessions Court have failed to appreciate the provisions of Section 202 of the Code of Criminal Procedure and erroneously passed the impugned orders.

6. Respondent No.1 is the complainant in the impugned complaint. On account of discharge of alleged liability, the cheques were issued by the accused, which were dishonoured. The learned Judicial Magistrate, First Class, issued the process on 16th November, 2016. While passing the said order, the said Court has observed that, on perusal of the complaint, verification statement and the documents, prima facie case is made out against the accused for the offence punishable under Section 138 of the Negotiable Instruments Act. Hence, the Court issued the process for the said offence.

7. The petitioner has relied upon the decision of this Court, in the case of Nectar

Solutions Private Limited, Mumbai and Others Vs. Penakle Industry Private Limited, and Others 2012(3) Mh.L.J. 725 during the course of hearing of the revision case before the Sessions Court. In the said decision, this Court has considered the issue relating to compliance of the provision of Section 202 of the Code of Criminal Procedure. It was observed that accused was residing beyond the jurisdiction of the Court and the process was issued against them by the Trial Court without complying mandatory provision of Section 202 of the Code of Criminal Procedure. The Sessions Court considered the decision of this Court, in the case of Dr. (Mrs.) Rajul Ketan Ra j Vs. Reliance Capital Limited And Another (2016(1) BCR 807) as well as the other decisions wherein it was observed that, it is not required to hold enquiry under Section 202 of the Code of Criminal Procedure.

8. The Supreme Court in the case of Abhijit Pawar Vs. Hemant Nimbalkar and Anr (supra) has observed that enquiry under Section 202 of the Code of Criminal Procedure is required to be conducted in the event the accused are residing beyond the jurisdiction of the trial Court in accordance with the amended provision of Section 202 of the Code of Criminal Procedure. However, it is pertinent to note that the said observations were made in relation to the offence under the Indian Penal Code. Similar view was expressed by the Apex Court in the other decisions also. However, this Court in several decisions, some of which are referred by the Revisional Court, has consistently taken view that while deciding the complaint under Section 138 of the Negotiable Instrument Act, it is not mandatory to hold enquiry under Section 202 of the Code of Criminal Procedure. The Court has distinguished the decisions wherein the Court has taken view with regard to the enquiry under Section 202 of the Code of Criminal Procedure qua the proceedings under the Penal Code.

9. In the decision of this Court in the case of Dr. (Mrs.) Rajul Ketan Raj Vs. Reliance Capital Ltd and Another (supra) it is observed as under :"" The very object of the Act will stand defeated if the enquiry under Sub Section (1) of Section 202(1) of Cr.P.C is held to be mandatory, in the complaint under Section 138 of the Negotiable Instruments Act. "" In the said decision, the Court has also referred to the decision of this Court in the case of Bansilal Kabra Vs. Global Trade Finance Limited (2010 All M.R. (Cri.) 3168) wherein similar view was taken with regard to provision of Section 202 of the Code of Criminal Procedure. The Court has referred to decisions in the case of Nectar Solutions Private Limited, Mumbai and Others Vs. Penakle Industry Private Limited, and Others (2012(3) Mh.L.J. 725) as well as decision of the Hon''ble Supreme Court in the case of Vijay Dhanuka ETC Vs. Najima Mamtaj ETC (2014 All MR (Cri.) 1924 (SC). The Hon''ble Supreme Court in the said decision has considered the issue relating to compliance of Section 202 of the Code of Criminal Procedure, qua the prosecution under the Indian Penal Code. This Court has drawn distinction between the proceedings under Section 138 of the Negotiable Instruments Act and the prosecution under the Indian Penal Code. Taking into consideration the object of the Act and the requisite provision of the Negotiable Instruments Act, it

was observed that in accordance with scheme of the said Act, the enquiry contemplated under Section 202 of the Code of Criminal Procedure is not mandatory. In the decision relied upon by the Advocate for the petitioner, in the case of Abhiji Pawar Vs. hemant Madhukar Nimbalkar and Anr. (supra) the Hon''ble Supreme Court has considered the scope of Section 202 of the Code of Criminal Procedure with regard to the complaint which was filed for the offence under the Indian Penal Code. Similar observations were made in the decision of Vijay Dhanuka ETC Vs. Najima Mamta j ETC (2014 All MR (Cri.) 1924 (SC), which was taken into consideration by this Court in the case of Dr. Rajul Ketan Raj Vs. Reliance Capital Ltd and Another (supra) . This Court in the decision of Vijay Tata Ravipathy Vs. Media Scope Publication (India) Pvt Limited and Another Vs. State in Criminal Application No . 1248 of 2016 has reiterated and accepted the aforesaid decision in the case of Dr. Rajul Ketan Raj Vs. Reliance Capital Ltd and Another (supra) and it was observed that enquiry stipulated under Section 202 of the Code of Criminal Procedure is not mandatory in the proceedings arising out of the Negotiable Instruments Act. In my opinion, the enquiry under Section 202 of the Code of Criminal Procedure is not mandatory in proceeding under Section 138 of the Negotiable Instrument Act. I am in agreement with view expressed by this Court in the case of Bansilal Kabra as well as Dr. Rajul Ketan Raj.

10. In view of the above, I do not find any reason to interfere with the order passed by the learned Magistrate issuing process and the order passed by the Sessions Court, Aurangabad dismissing the revision application preferred by the petitioner. Hence, I pass the following order

ORDER Criminal Writ Petition No. 997 of 2017 stands dismissed.

