
(2012) 10 BOM CK 0200

In the Bombay High Court

Case No : Criminal Application No. 1346 of 2005

Mr. Amol Shripal Sheth

APPELLANT

Vs

M/s. Hari Om Trading Co. and Others

RESPONDENT

Date of Decision : 03-10-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190, 2(d), 200, 201, 202

Evidence Act, 1872 — Section 106, 114

Negotiable Instruments Act, 1881 (NI) — Section 138, 138(b), 139, 140

Citation : (2013) 3 ABR 820 : (2013) 2 BC 1 : (2013) BomCR(Cri) 152

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : S.B. Lakhotiya holding for . Mr. R.F. Totala, for the Appellant; K.C. Sant, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

T.V. Nalawade, J.—All the three applications are filed u/s 482 of Criminal Procedure Code. The petitioner from the three proceedings is the same and the same point is involved in the three proceedings and so they are being decided together. The proceeding bearing Criminal Application No. 1346/2005 is filed against the judgment and order of Criminal Revision No. 335/2004, which was pending in the Sessions Court, Jalgaon. This revision was filed against the order made in R.C.C. No. 315/2003 by Chief Judicial Magistrate, Jalgaon (hereinafter referred to as "Magistrate" for short) on Exh. 12. The C.J.M. allowed the complainant from the proceeding filed u/s 138 of the Negotiable Instruments Act to correct the name of the accused/present petitioner from "Amol Trilokchand Shaha" to "Amol Shripal Seth". The Magistrate had already issued process against the accused when the amendment was allowed.

2. The complainant has contended that the present petitioner was Chairman of the partnership firm, accused No. 1. It is contended that accused No. 3 was working as a Director and accused No. 4 was the Officer authorized by accused

No. 1 concern, to sign the cheques. It is the case of the complainant that the accused Nos. 2 to 4 are responsible for conducting the business of accused No. 1 concern as they were doing acts like purchasing goods, preparing bills and making payments in respect of the goods purchased for accused No. 1. The complainant had issued a statutory notice in this case after receiving the bank note in respect of dishonour of cheque, but the reply was not given in R.C.C. No. 315/2003. It is contended that the notice was received on 14.2.2003.

3. In the statutory notice, the complainant had given the name of present petitioner as "Amol Trilokchand Shaha". The Revisional Court has held that the complainant probably did not know the correct name of this accused, but there cannot be any question of identity about this accused. The Sessions Court has held that on the basis of document like Exh. 18, produced before the Magistrate, it can be inferred that the present petitioner was working as Managing Director of accused No. 1 company. This document was purportedly signed by the present petitioner. The Sessions Court has held that the petitioner is the same person, who was named as accused No. 2 in the complaint and so interference in the order made by Magistrate is not possible. In the present proceeding a copy of letter signed by Company Secretary came to be produced for petitioner to show that the petitioner was never working as Chairman of accused No. 1 concern.

4. The advocate of the complainant has placed reliance on three reported cases which are as under :-

(i) 2004 ALL MR (Cri) 334 Bombay High Court [Shri. Waman Laxman Sawant Vs. Shri. Ashok Anand Sawant & Anr.,

(ii) 2005 Bom C.R. (Cri.) 1699 [Maan Agro Centre Vs. E.I.D. Parry (India) Limited & Anr., and

(iii) M/s. Dalmia Cement (Bharat) Ltd. Vs. M/s. Galaxy Traders and Agencies Ltd., .

In the case of Waman Sawant cited supra, this Court has held that though there is no express provision giving power to Magistrate to allow the amendment in the complaint, such power is there as such power is required for very existence and survival of the Criminal Court. In the second case of Maan Agro Centre cited supra, this Court has held that if there is no doubt about the identity of accused, it can be presumed that no prejudice will be caused, if the name of the accused is not correctly mentioned in the complaint. In the second case one case of Rajasthan High Court reported as 2004 (2) D.C.R. 158 [Bhim Singh vs. Kan Singh] was referred. Rajasthan High Court has held that mistakes can be rectified by Subordinate Criminal Courts by observing that Subordinate Courts are not powerless to do what is absolutely necessary for dispensation of justice in the absence of any specific provision preventing them to do so. In the third case M/s. Dalmia Cement cited supra, the Apex Court has discussed the object behind the provisions of sections 138 to 142 of the Negotiable Instruments Act ("N.I. Act" for short) and it is laid down that the interpretation of these

provisions need to be made in such a way that the object intended by the provisions is achieved.

5. For the present petitioner, reliance was placed on the case reported as 2003 Bom. C.R. (Cri.) 1769 Bombay High Court [Behram S. Doctor Vs. State of Maharashtra and Anr.]. In this case, in a matter filed u/s 138 of N.I. Act, the name of the original accused was changed by allowing the amendment from "B.S. Dastoor" to "Behram S. Doctor". this Court held that the complaint as against Behram S. Doctor was not within limitation as provided in section 468 of Cr.P.C. It is observed that it was not possible to introduce the amendment after three years from the date of cause of action for filing the complaint. this Court further held that the Magistrate has no power to allow the amendment of the complaint. More cases were cited for the present petitioner like (ii) 2000 CRI.L.J. 1579 (1) Madras High Court [Vinayagam and others Vs. Dr. Subhash Chandran and etc.], (iii) 2009 (2) ALL MR (JOURNAL) 61 Madhya Pradesh High Court [Sunderdev Vs. Yogesh]. In these cases, similar observations are made by these two High Court. Two more cases like Ashok Chaturvedi and Others Vs. Shitulh Chanchani and Another, and Subodh S. Salaskar Vs. Jayprakash M. Shah and Another, were also cited. These cases are on different points.

6. It was submitted for the petitioner that while deciding the case of Waman Savant cited supra, this Court (other bench) did not refer the case of Behram S. Doctor cited supra and so the later decision needs to be treated as per incuriam. It was submitted that if there are two views possible, the matter needs to be referred to a larger bench. On this point, reliance was placed by the advocate of petitioner on following cases.

(i) 2009 (2) ALL MR (Journal) 61 [Sunderdev vs. Yogesh],

(ii) 2000 CRI.L.J. 1579 (1) [Vinayagam and others Vs. Dr. Subhash Chandran and etc.],

(iii) Subodh S. Salaskar Vs. Jayprakash M. Shah and Another, ,

(iv) Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others,

7. In the peculiar circumstances of the case, various provisions of Cr.P.C. need to be seen and also interpretation of the Special Enactment viz. N.I. Act needs to be done as per the observations made by the Apex Court in the case of Dalmiya Cement cited supra. this Court holds that the point involved needs to be looked into from different angles and there is no need to refer the case to a larger bench. If there are provisions in Cr.P.C., which directly and indirectly give power to allow such amendment, then it can be said that the Magistrate has not used any inherent power as described in section 482 of Cr.P.C. and which is not available to him. Further, if the provisions of N.I. Act, the Special Enactment, show that it was necessary for the drawer of the cheque itself to give the particulars for filing of the complaint, such defence cannot be available to the persons like the petitioner whose identity can be established during trial and

whose involvement for the offence can also be established.

8. For considering the powers of Magistrate, the relevant provisions of Cr.P.C. first needs to be seen. The relevant portion from section 2 (d) of Cr.P.C. in which the definition of the term "complaint" is given which is as under:-

(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Thus, in the strict sense there is no necessity to mention the name of person who has committed the offence in the complaint.

9. In the case of 2006 CRI.L.J. 788 (Supreme Court), [Mohd. Yousuf Vs. Smt. Afaq Jahan & Anr.], the Apex Court has laid down that there is no particular format for complaint. A petition containing allegations that the offence has been committed and ending with a prayer that the culprits be suitably dealt with, can be treated as a complaint. In the case reported as Bhimappa Basappa Bhu Sannavar Vs. Laxman Shivarayappa Samagouda and Others, , the Apex Court has laid down that to come within the purview of section 2 (d) of Cr.P.C., the complaint is to fulfill following conditions.

(i) An allegation is made orally or in writing,

(ii) This allegation reveals that some person, known or unknown, has committed the offence,

(iii) Such allegation is made to Magistrate,

(iv) The purpose of allegation is that the Magistrate should take action under the law.

10. Section 190 of Cr.P.C. provides that the Magistrate can take cognizance of an offence in three ways mentioned. This section falls under Chapter XIV of Cr.P.C., which is titled as "CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS". The section 190 of Cr.P.C. reads as under:-

190. Cognizance of offences by Magistrates.- (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second

class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

Thus, in this section also it is made clear that the complaint must contain the facts which constitute offence and it does not show that the name of person, who committed the offence, must be mentioned.

11. In Chapter XV of Cr.P.C., the procedure which the Magistrate is expected to follow after taking cognizance of the offence is given. Sections 200 and 201 of Cr.P.C. show that there is no mention of term "accused", or the name of the person who committed offence. First time, in section 202 (recently amended) the term "accused" is used, but it is used for limited purpose, to see that the accused living beyond the local jurisdiction of Magistrate is not unnecessarily harassed by calling him to the Court. In such a case, if there is no sufficient material against the accused to make out prima facie case against him, to proceed against him, the Magistrate is expected to see that the complaint is dismissed after making necessary inquiry.

12. Chapter XVI of Cr.P.C. is titled as "COMMENCEMENT OF PROCEEDING BEFORE MAGISTRATE". The criminal proceeding starts before the Magistrate when Magistrate takes action under the provisions of this Chapter. Relevant provision of section 204 reads as under :-

204. Issue of process.- (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) a summons-case, he shall issue his summons for the attendance of the accused,

(b) a warrant-case, he may issue a warrant, or if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or if he has no jurisdiction himself some other Magistrate having jurisdiction.

13. The aforesaid provisions of Cr.P.C. shows that during inquiry, which can be made by a Magistrate u/s 202 of Cr.P.C. and during investigation which can be directed under same section, it is necessary to ascertain, who has committed the offence. The Magistrate takes cognizance of the offence as provided u/s 190 of Cr.P.C. and the definition of "complaint" given in section 2 (d) of Cr.P.C. and the Magistrate does not take the cognizance of offender under these sections. It is not that the powers to ascertain the offender mentioned in section 202 and 204 of Cr.P.C. come to an end after making the order of issue process u/s 204 of Cr.P.C.

14. Section 319 of Cr.P.C. shows that the Criminal Court has the power to proceed against person other than the accused, if it appears from the evidence that other person not being the accused, has committed any offence for which he needs to be tried in the case already before the Court. In the case reported as Bholu Ram Vs. State of Punjab and Another, , the Apex Court has laid down that

the power given to Criminal Court u/s 319 of Cr.P.C. is incidental and ancillary to main power given to Criminal Court to take cognizance of the offence. It is observed that the power u/s 319 of Cr.P.C. is a part of normal process in the administration of justice. The power u/s 319 is discretionary in nature. The observations of the Apex Court and this provision of Cr.P.C. again show that the Magistrate takes cognizance of the offence and not of the offender.

15. The aforesaid provisions of Cr.P.C. show that if the Magistrate takes cognizance of the offence, he needs to ascertain as to who has committed the offence. In the case like present one, the complainant may not be in a position to get the correct name of the accused. A tight schedule of time limit created by the provisions of N.I. Act also needs to be kept in mind in such a case. Due to such tight schedule of time limit, which is mandatory in nature, in many cases the complainant may not be able to get the complete and correct name of the responsible persons for dishonour of cheque at the time of filing of the complaint. So in view of these circumstances and the aforesaid provisions of Cr.P.C., the Magistrate can take cognizance of the offence and he may issue process even against the persons whose name is not correctly described by the complainant. If after appearance of accused, the defence taken like in the present case is there, the Magistrate needs to ascertain as to whether there is doubt about the identity of the person described by the complainant in the complaint and as to whether the person who appeared as accused is the same or not. That can be done even during trial. If the accused points out the defects in the name given in the complaint, but he is not in a position to show that he is a different person, he cannot take benefit of such defects. There is no provision in Cr.P.C. providing for dismissal of the complaint due to such defect. Complaint can be returned only u/s 201 of Cr.P.C., if the Magistrate finds that he is not competent to take cognizance of such a case. So, if there is no doubt about the identity of the accused described in the title and in the body of the complaint, such person cannot get acquittal by taking such defence. For such defence, the complaint also cannot be dismissed u/s 203 of Cr.P.C. The burden to establish the identity of accused and involvement of the accused in the crime is always on the prosecution and the opportunity to establish both the things cannot be taken away from the prosecution, if there is such defect. Thus, in one way, it can be said that the accused does not get any benefit due to such defect. Then, the question arises as to what needs to be done or what can be done in such cases to correct such mistake.

16. It is not disputed that there is no specific provision dealing with the amendment of the complaint. There is also no provision preventing the Court from allowing the amendment in complaint in such a case. From the aforesaid provisions and particularly, the fact that the Magistrate takes cognizance of the offence, this Court holds that the Magistrate has incidental and ancillary power to the main power of taking cognizance of offence to allow such amendment. In view of the discussion made above, this Court further holds that the power can be exercised before and after taking cognizance of the offence in a case like

present one.

17. As the provisions of Special Enactment viz. N.I. Act can supersede the general provisions of Cr.P.C., let us see whether there is any provision in N.I. Act, which prevents the Magistrate from allowing the amendment or whether there is any provision which directly or indirectly shows that the accused cannot take benefit of such defence. Section 141 of N.I. Act reads as under :-

141. Offences by companies.- (1) If the person committing an offence u/s 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

The provision of section 141 of N.I. Act shows that it has two parts. Section 141 (1) shows that when a company commits offence u/s 138 of the N.I. Act, every person, who was incharge and responsible for the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty. Thus, as per the first part, mere position of a person that he was conducting the business of the company is sufficient, for holding him guilty and such allegations in the complaint becomes sufficient, for proceeding against him. The second part, section 141(2) shows that the presumption would arise against the Director, Manager, Secretary etc. only when it is proved that the offence has been committed with the consent or connivance or even negligence on the part of such person. So the act or omission of such Director is required to be proved for proving the guilt. In view of this position, there need to be allegation against such person to that effect and only after that the court can proceed against them.

18. The complainant being stranger to the company, may not have the knowledge about the management or affairs of the company. Section 138 (b) of N.I. Act shows that statutory notice needs to be given to the drawer of the cheque, to the company. In view of this circumstance, the Director receiving notice for the company or other office bearer receiving notice for the company, is expected to give the name of person incharge and responsible for the conduct of the business of company. If the office bearer receiving notice prefers to give the

reply to statutory notice, it is not sufficient for him to only deny the responsibility, but it becomes necessary for him to say something on behalf of the company about the person who can be held responsible in view of the aforesaid provision. It is already observed that in view of the proviso to section 141 (1) of N.I. Act, the burden is on the office bearer like the Managing Director to give such information, so that he can show that the offence was committed without his knowledge. These are the provisions of Special Enactment viz. N.I. Act and they are not inconsistent with the general provisions of Cr.P.C., which are already quoted. Thus, provisions of N.I. Act show that there is burden of proof of defence on the person like Managing Director of the company under the proviso of section 141 (1) of N.I. Act.

19. The provision of section 138 (b) and 141 of N.I. Act show that along with other conditions laid down in section 138 of N.I. Act, if the conditions laid down in these sections 138 (b) and 141 of the Act are satisfied, the cognizance of the offence punishable u/s 138 of the N.I. Act can be taken, the proceedings can be initiated and there can be commencement of criminal proceeding. If the drawer of the cheque or for that matter, Managing Director or the office bearer, who received the notice, does not inform the name of the person responsible for dishonour of cheque and so the name of the person responsible for conducting the business of the company is mentioned incorrect in the complaint, the complainant cannot be blamed for the defects of the present nature, found in the complaint. In such a case, the complainant cannot be made to suffer for such defects. Further, when there are allegations as expected in section 141 of the Act in the complaint, such allegations would become sufficient for proceeding against the Managing Director and other office bearer, who received the statutory notice for the company or who has signed the cheque. In such a case, the provisions of section 106 and 114 of the Evidence Act can be used. In view of these provisions of Evidence Act also, such persons cannot be allowed to take the benefit of such defect found in the complaint. On this point, reliance can be placed on the case reported as AIR 2007 SC 1682 [N. Rangachari Vs. Bharat Sanchar Nigam Limited].

20. In view of the discussion made above, this Court holds that there is no force in the grounds raised by the petitioner in the first proceeding. The proceeding bearing Criminal Application No. 1347/2005 is filed against the order made on Exh. 8 of R.C.C. No. 69/2003 by the C.J.M., Jalgaon, which has confirmed by Sessions Court, Jalgaon in Criminal Revision No. 337/2005. Proceeding bearing Criminal Application No. 1348/2005 is filed against the order made by the C.J.M. on Exh. 8 in R.C.C. No. 68/2003, which is confirmed by the Sessions Court, Jalgaon in Criminal Revision No. 336/2005. There is only one difference in the facts of these two proceedings viz. the accused No. 1, company, gave reply to the statutory notice in these two cases. However, only the responsibility was denied by the company and the aforesaid expected information was not supplied to the complainant. Thus, interference is not possible in the orders made by Magistrate in all the three cases and the decision given by Sessions Court in the

Criminal Revisions. The advocate for the petitioner requested for stay to the proceedings for some time as the petitioner wants to challenge the order of this Court. The record shows that this Court has granted stay, though only in respect of the petitioner during the pendency of the proceedings. In view of the discussion made above, this Court has no hesitation to observe that the petitioner is doing everything to protract the hearing of the case filed against him. His steps are indirectly protracting the decision of the cases, which were filed in the year 2003. In the case reported as 2005 (2) All M.R. 581 (Bombay High Court) [KSL & Industries Ltd. Vs. Mannalal Khandelwal & Anr.], this Court has discussed the provisions of N.I. Act and this Court has observed that it is the duty of the Magistrate to see that such cases are expeditiously disposed of. In view of the legislative intent behind the provisions and the time limit fixed, this Court has no hesitation to hold that even this Court is expected to show the respect to the said legislative intent. The defences taken in such a proceeding like the defence taken by the petitioner can be dealt with in the case itself and so it is not desirable to grant stay to the criminal proceedings. So all the three proceedings stand dismissed.