

(1999) 12 KL CK 0010
In the High Court Of Kerala
Case No : W.A. No. 2277 of 1999 (C)

N. Harihara Iyer

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 10-12-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 192, 2, 200, 202, 203
Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 142

Citation : (2000) 1 CivCC 360 : (2000) CriLJ 1251 : (2000) 1 RCR(Criminal) 360

Hon'ble Judges : S. Sankarasubban, J;AR. Lakshmanan, J

Bench : Division Bench

Advocate : P.B. Sahasranaman, for the Appellant; K. Gopalakrishna Kurup, Public Prosecutor and M.N. Sukumaran Nair, for the Respondent

Final Decision : Dismissed

Judgement

AR. Lakshmanan, J.—The complainant before the Chief Judicial Magistrate Court, Ernakulam, in complaints filed u/s 142 of the Negotiable Instruments Act and Section 190 of the Code of Criminal Procedure alleging an offence u/s 138 of the Negotiable Instruments Act against the accused, is the petitioner in the Original Petition, which was filed :

(i) to declare that in respect of the complaints lodged u/s 142 of the Negotiable Instruments Act, 1881, for taking cognizance, the examination of the complainant is not necessary u/s 200 of the Cr.P.C;

(ii) to issue necessary instructions to all the Magistrates in the State of Kerala to take cognizance of the offences u/s 142 of the Negotiable Instruments Act by verifying the complaint and the documents produced by them and the examination of the complainants shall be insisted only if there is any discrepancy between them; and

(iii) to issue necessary instructions to all the Magistrate to give priority to the complaints lodged u/s 142 of the Negotiable Instruments Act, by the senior

citizens and women.

The writ petition was dismissed by Koshy, J. by judgment dated 20-9-1999. The judgment reads thus :-

This original petition is filed by the petitioner who filed three criminal complaints against three different persons, namely, Dr. V. Venugopalan, C.J. Vincy and C.J. Joseph on 3-4-1999 before the Chief Judicial Magistrate, Ernakulam. The said complaints as stated in the original petition were posted for taking statements u/s 200 of the Criminal Procedure Code. According to the petitioner, such statements are not necessary and he wants a declaration that in respect of complaints lodged u/s 142 of the Negotiable Instruments Act, 1881, for taking cognizance, the examination of the complainant is not necessary u/s 200 of the Cr.P.C.

2. When the case came up for the last time, this Court pointed out that aggrieved parties against whom criminal complaints were raised should be made parties. Now petitioner submits that he will not implead them as it is not necessary. I am not in a position to give a declaration without the contesting respondents are made parties in the case.

The original petition is dismissed without prejudice to the petitioner's rights.

Aggrieved by the said judgment, the above appeal has been filed.

2. The reliefs prayed for are substantial questions of law, which has far-reaching consequences. Therefore, we heard the matter at length and proceed to consider the submissions made by Mr. P.B. Sahasranaman, learned counsel for the appellant and Mr. K. Gopalakrishna Kurup, learned Public Prosecutor. We also heard Mr. M.N. Sukumaran Nair, Senior Advocate, who was waiting for some other case in Court.

3. The appellant-petitioner used to advance money to various persons and on that transaction, used to receive cheques and used to lodge complaints under the provisions of the Negotiable Instruments Act if cheque bounces. Accordingly, he has instituted few criminal complaints against different persons before the Chief Judicial Magistrate, Ernakulam, which were also numbered. After the receipt of the complaint, the learned Magistrate has posted the case on 22-6-1999 for taking sworn statement u/s 200 of the Code of Criminal Procedure. On that day, the Magistrate has taken the statement and issued summons to the accused. Thereafter the matter was adjourned for taking sworn statement in other cases. According to Mr. Sahasranaman, the examination of the complainant on oath u/s 200, Cr.P.C. is not essential in cases coming u/s 142 of the Negotiable Instruments Act. As per Section 200, Cr.P.C. 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 in writing and shall be signed by the complainant and the witnesses by the Magistrate. It is submitted by Mr. Sahasranaman that the "complaint" stated in

the Criminal Procedure Code is quite different from the "complaint" lodged under the Negotiable Instruments Act and the complainant in all the cases under the Negotiable Instruments Act is necessarily the holder of the cheque. Similarly, the accused is a named person. The documentary evidence in support of the same have to be produced along with the complaint and so, there is no scope for any oral evidence before taking cognizance of the complaint and whether the complaint shows any prima facie case or not can be ascertained from the complaint and the documents produced along with it by the complainant and, therefore, there is no scope for the oral examination of the complaint lodged u/s 142 of the Negotiable Instruments Act.

4. The term "complaint" has been defined under the Code of Criminal Procedure as follows :-

Section 2(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.

5. It is essential to see the definition of Section 200, Cr.P.C. and Section 142 of the Negotiable Instruments Act :

CODE OF CRIMINAL PROCEDURE

Section 200 Examination of complainant:- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complaint 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 u/s 192 :

Provided further that if the Magistrate makes over the case to another Magistrate u/s 192 after examining the complainant and the witnesses, the later Magistrate need not re-examine them.

NEGOTIABLE INSTRUMENTS ACT :

Section 142. Cognizance of offences.-Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no court shall take cognizance of any offence punishable u/s 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date of which the case of action arises under Clause (c) of the proviso to Section 138;

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable u/s 138.

6. It is the grievance of Mr. Sahasranaman that substantial number of cases are pending before the Magistrate Courts u/s 142 of the Negotiable Instruments Act and for examining the complaint, more than fifteen minutes are spent per case and due to lack of time only in five to ten cases the complainants are examined and all other cases are adjourned and they are being adjourned for more than three months due to paucity of time and in matters posted u/s 200, Cr.P.C, examination are taken as the last item and so, the complainant has to wait till his case is taken up throughout the day, which causes difficulties to persons like the appellant-petitioner, the senior citizens and women, etc. This apart, most of the case filed u/s 142 are settled out of Court and only 5% of the cases lodged are contested and if so cognizances can be taken of the offences u/s 142 of the Negotiable Instruments Act substantial judicial time can be saved.

7. In the above circumstances and in the interest of justice, he prays that a direction on judicial side is highly necessary.

8. The Negotiable Instruments Act, 1881 was amended by the Banking, Public Financial and Negotiable Instruments Laws (Amendment) Act, 1988 with effect from 1-4-1989. The main purpose is to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment by honest drawers. Chapter XVII, Sections 138 - 142 were inserted in the Negotiable Instruments Act. Before launching of the prosecution the payee or holder in due course of the cheque has to comply with certain formalities. Even though Criminal Procedure Code permits the lodging of complaints either orally or in writing, Section 142 of the Negotiable Instruments Act stipulates that the complaint is to be in writing. This specific stipulation was made in the Negotiable Instruments Act for the reason that the offence is mainly based on documents, like cheque, the intimation from the banks, the demand notice, and the acknowledgement of the said demand notice or the rejected demand notice. Section 139 draws a presumption in favour of the holder of the cheque that the cheque was issued in discharge of the whole or in part of the liability. Thus, Mr. Sahasranaman submitted that there is no scope for oral explanation of documents produced.

9. It is also urged that the complaints lodged under the Code of Criminal Procedure are different from the complaints lodged u/s 142 of the Negotiable Instruments Act. Being a special statute, it has to be viewed differently from the complaints lodged under the Cr.P.C. Arguing further, the learned counsel for the appellant submitted that the purpose of examination is to ascertain whether

there is prima facie case and sufficient ground for proceeding against the accused and the ingredients for proving an offence u/s 138 depends mainly on the documents produced in support of it, in view of the presumptions drawn in favour of the holder of the cheque. So, there is no scope for adding or reducing anything other than the documents produced in support of it. Thus, there is no scope for the examination of the complainant and that the object of the examination of the complainant and witnesses has no value in the above circumstances.

10. We have already extracted Section 200 of the Code of Criminal Procedure and Section 142 of the Negotiable Instruments Act. We shall now consider the scope and application of the above two provisions. Section 200 of Cr.P.C. deals with examination of complainant. It comes under Chapter XV, which lays down the procedure to deal with complaints made by private persons. This section provides that if a Magistrate takes cognizance of an offence on complaint, he must-(a) examine upon oath the complainant (even though the complaint is in writing) and the witnesses present, if any, and (b) reduce its substance to writing. As examination of the witnesses present is compulsory, the Magistrates would be well advised to enquire if witnesses are present and to note if there is none. In other words, under this Section it is incumbent on the Magistrate taking cognizance on a complaint to examine upon oath the complainant and his witnesses present, if any, to satisfy himself as to the veracity of the complainant and as to any points on which he is silent, or on which there may be doubt. The object is to test whether the allegations make out a prima facie case to enable him to issue process. If the Magistrate finds no prima facie reason to distrust and the facts constitute an offence under the law, it is incumbent to issue process forthwith. If the Magistrate distrusts the complainant altogether or if no offence is made out, it is equally his duty to dismiss the complaint u/s 203. Courts have held that if cognizance is taken by the Magistrate, he is bound first to examine on oath the complainant and his witnesses present, if any, and thereafter he may issue process if he thinks that prima facie an offence has been made out and dismiss the complaint u/s 203 as already noted. The Section obligates the Magistrate to examine upon oath the complainant and the witnesses present, if any. The object of such examination is to ascertain whether there is a prima facie case and sufficient ground for proceeding. Thus, in our opinion, Section having cast an imperative duty to examine the witnesses as well, he ought to enquire if there are witnesses to be examined.

11. So far as Section 142 of the Negotiable Instruments Act is concerned, it states that the cognizance of an offence can be taken u/s 138 upon a complaint in writing, which must be made within one month by the payee or holder in due course from the date on which the cause of action arises under Clause (c) of the proviso to Section 138. Section 142(b) provides that the complaint should be in writing and should be signed by the complainant. The word "complaint" is not defined in the amended provisions of the Act, which should, however, contain allegations of the commission of an offence. A complaint can be filed within one

month from the date on which the cause of action arises under Clause (c) of the proviso to Section 138. The period of one month from the cause of action contemplated by Clause (b) of Section 142, within which the complaint for an offence u/s 138 has to be filed, is to be reckoned from the expiry of the period of 15 days from the notice of dishonour within which the maker/drawer of the cheque must make payment under the dishonoured cheque.

12. It is undisputed that the taking of cognizance of offence u/s 142 of the Act has to precede the taking of sworn statement of the complainant and that if the Magistrate straight away on receipt of the complaint records the sworn statement and thereafter he takes cognizance, it would be in contravention of Section 200 of the Code of Criminal Procedure. But, it is equally well settled that when a Magistrate after receiving the complaint applies his mind to take further steps under Chapter XV, then he must be deemed to have taken cognizance of the offence and that it is unnecessary that the Magistrate should pass specific order stating that he has taken cognizance of the offence.

13. As regards the requirement of the complainant to have locus standi, Section 142 of the Act makes it imperative that the complainant to have the locus standi, he should be either the payee of the cheque dishonoured or the holder in due course of such cheque, in the absence of which, the Magistrate is debarred to take the cognizance of the offence u/s 138 read with Section 142 of the Negotiable Instruments Act.

14. We shall now analyse the rulings cited by both sides. In *Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonker and Another*, , the Supreme Court held that the inquiry envisaged there is for ascertaining the truth or falsehood of the complaint, that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process.

15. In *Ranjit Singh Vs. The State of Punjab*, , the Supreme Court held that when a complaint is made by a Court, it is not necessary for a Magistrate to examine the complainant and that neither Section 200 nor Section 202 requires a preliminary enquiry before the Magistrate can assume jurisdiction to issue process against the person complained against.

16. In the decision reported in *Nirmaljit Singh Hoon Vs. The State of West Bengal and Another*, , the Supreme Court held that the object of such examination of the complainant is to ascertain whether there is prima facie case and the enquiry is for ascertaining the truth or falsehood of the complaint, that is for ascertaining whether there is evidence in support of the complainant, so as to justify the issue of process.

17. In *Nirmaljit Singh Hoon Vs. The State of West Bengal and Another*, : *Nirmaljit Singh Hoon Vs. The State of West Bengal and Another*, , the Supreme Court held as follows :-

An enquiry or investigation is ordered u/s 202 of the Code of Criminal Procedure

by a Magistrate on receipt of a complaint for the purpose of ascertaining the truth or falsehood of the complaint. If the Magistrate before whom the complaint is made or to be whom it has been transferred, after considering the statement on oath of the complainant and his witnesses and the result of enquiry or investigation u/s 202 is of the opinion that there is no sufficient cause for proceeding, he may for reasons to be recorded briefly, dismiss the complaint. If, on the contrary, the Magistrate taking cognizance of the offence is of the opinion that there is sufficient cause for proceeding, he should issue process against the accused in accordance with Section 204 of the Code.

18. A learned single Judge of this Court in the decision reported in *State v. Moidu* (1990) 2 Ker LJ 202, held that a Magistrate taking cognizance of a complaint u/s 200 of the Code of Criminal Procedure shall examine on oath the complainant and the witnesses, if any, present and the substance of such examination shall be reduced to writing and shall be signed by the complainant, witnesses and the Magistrate. The learned Judge has further held that such a procedure need not be followed where the complaint has been made by a public servant, acting or purporting to act in discharge of his official duties or where the Court has made the complaint.

19. We, therefore, hold that the enquiry envisaged u/s 200 is for ascertaining the truth or falsehood of the complaint and also for ascertaining whether there is any evidence in support of the complaint so as to justify the issue of process. Therefore, it is incumbent on the Magistrate taking cognizance on a complaint to examine upon oath the complainant and his witnesses present, if any, to satisfy himself as to the veracity of the complainant. The object is to test whether the allegations make out a prima facie case to enable him to issue process. We are, therefore, unable to countenance the argument advanced by Mr. Sahasranaman on the scope and application of Section 200 Cr.P.C. Likewise, the argument advanced by Mr. Sahasranaman with regard to Section 142 of the Negotiable Instruments Act has no basis as it is undisputed that the taking of cognizance of offence under the said Section has to precede the taking of sworn statement of the complainant and that cognizance should precede the recording of the sworn statement.

20. For all the foregoing reasons, we dismiss the Writ Appeal. No costs.

We place on record our thanks to Mr. M.N. Sukumaran Nair, Senior Advocate and Mr. Gopalakrishna Kurup, Public Prosecutor for the valuable assistance rendered to us in the matter.