(2010) 07 BOM CK 0126

In the Bombay High Court

Case No : Criminal Application No. 4514 of 2009

Nitesh Jayantilal Jain APPELLANT

Vs

State of Maharashtra and Another RESPONDENT

Date of Decision : 05-07-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 203, 204, 482
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 120B, 409, 418, 423, 465

Citation : (2010) 3 BC 619 : (2011) 7 RCR(Criminal) 1993

Hon'ble Judges : J.H. Bhatia, J

Bench : Single Bench

Advocate : Sandeep C. Kekane, instructed by M.K. Kocharekar, for the Appellant; A.A. Mane, APP, for the Respondent

Final Decision : Dismissed

Judgement

J.H. Bhatia, J.—Heard learned Counsel for the parties.

2. The applicant before this Court is the original accused while respondent No. 2 is the original complainant. The complainant filed complaint u/s 138 of the Negotiable Instruments Act in Metropolitan Magistrate, 7th Court at Dadar and it came to be registered as Criminal Case No. 5342/SS/2005. According to complainant on the request of accused, he advanced loan of Rs. 1,00,000/- to the accused, which he assured to repay within the stipulated period. He issued postdated cheque dated 21.4.2005 in favour of the complainant. The cheque was drawn on Dena Bank, Worli Branch, Mumbai. The cheque was presented for encashment, but it was returned with return memo dated 27.5.2005 of Dena Bank and return memo dated 28.5.2005 from United Bank of India through which the complainant had presented cheque to Dena Bank. The endorsement from Dena Bank showed that the cheque was returned unpaid for "funds insufficient". After that notice dated 25.6.2005, was issued calling upon the accused to make payment. The notice was received by him and he also replied to

the said notice through his advocate on 8.7.2005. He failed to make payment within the stipulated period. Therefore, complaint u/s 138 of the Negotiable Instruments Act.

3. On the basis of that complaint, learned Metropolitan Magistrate, directed to issue process against the accused u/s 138, Negotiable Instruments Act. That order was challenged by the accused in Revision Application No. 299 of 2007 on the ground that process was issued without following the procedure prescribed u/s 200 which requires recording the statement of the complainant to verify the contents of the complaint. The learned Additional Sessions Judge, by order dated 25.1.2008, allowed that revision application setting aside the order passed by the Magistrate. The learned Additional Sessions Judge directed the Magistrate to proceed with the complaint from the stage of recording verification statement of the complainant and to proceed for issuing process as per law. The accused was not satisfied with that order and he filed Criminal Writ Petition No. 318 of 2008. That writ petition was dismissed upholding the order of Sessions Court. In view of the order, passed by the Sessions Court, the learned Magistrate recorded verification statement of the complainant and also he recorded the statement on oath of witness from Dena Bank. In view of oral as well as documentary evidence placed by complainant, learned Magistrate passed fresh order dated 24.4.2009 for issuing process u/s 138 of Negotiable Instruments Act against the accused. That order is challenged in the present application u/s 482 of the Criminal Procedure Code.

4. The learned Counsel for the applicant accused contended that the verification statement is not mere formality and unless the complainant makes statement on oath in respect of the relevant facts to make out a case for issuance of process, process cannot be issued. In support of this contention he placed reliance upon Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, , wherein the Hon''ble Supreme Court observed in para 7 thus:

In a case where the Court is required to issue summons which would put the accused to some sort of harassment, the Court should insist strict compliances of the statutory requirements. In terms of Section 200 of the Code of Criminal Procedure, the complainant is bound to make statements on oath as to how the offence has been committed and how the accused persons are responsible therefor.

5. In Captain Lance Irwin Lobo v. Ismail D''souza @ Angela Ismail De Souza and Anr. 2007 ALL MR (CRI) 623, the learned Single Judge of this Court, Panaji Bench considered the provisions of Sections 200, 202 and 204 and observed in para 16 as follows:

16. 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. The reading of the statement on oath of the complainant u/s 200, Cr.P.C, is not an

empty formality. 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 the 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. As observed by the Apex Court time and again, summoning of an accused in a criminal case is a serious matter and criminal law cannot be set into motion as a matter of course. A Magistrate is required to examine the nature of the allegations made in the complaint and the evidence both oral and documentary to see if it is sufficient for the complainant to succeed in bringing charge home to the accused. In other words, the examination of the complainant on oath is for the purpose of ascertaining whether a prima facie case is made out against the accused to issue process so that the issue of process is prevented on a complaint which is either false or vexatious or intended only to harass. As observed by the Apex Court in Punjab National Bank and others Vs. Surendra Prasad Sinha, , it is salutary to note that judicial process should not be an instrument of oppression or needless harassment. A Magistrate is required to find out whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued and at that stage the Court has got to be circumspect in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument, in the hands of the private complaint as vendetta to harass the person needlessly. Vindication of Majesty of justice and maintenance of law and order in the society are the prima objects of criminal justice but it would not be the means to wreak personal vengeance.

6. In that case certain contract had taken place about the property in the year 1995, wherein a Power of Attorney was executed and that Power of Attorney was revoked in March, 2001 by issuing public notice. The revocation of the said Power of Attorney was contested by the accused in that case. The civil suit was also filed in 2001 for specific performance of the contract and for damages by the complainant. Sale deed was executed by the accused as Attorney of the complainant in May, 2003. On 25.112004, the complainant filed complaint under Sections 409, 418 423, 465, 468, 471 and 120B, Indian Penal Code against accused persons. Process was issued by the learned Magistrate for the offences

except u/s 468. The accused challenged that order in the Court of Sessions. The Additional Sessions Judge deleted most of the sections and maintained the order to issue process only for the offence of breach of trust u/s 409, IPC. That order was challenged by the accused before High Court, mainly on the ground that there was no proper verification of the facts stated in the complaint to make out a case u/s 409 or any other section. Taking into consideration all these complicated allegations and facts, this Court held that the complainant had not stated all these facts in his verification statement to make out a criminal case even for issuance of process u/s 409 and, therefore, the complaint was dismissed.

7. In the present case, in the complaint all the details of the transactions are given. In the verification statement dated 18.9.2008, the complainant had clearly stated that he had made payment to the accused and accused had given cheque to him. The cheque was presented to the Bank, but it was unpaid. Cheque was presented but it was returned unpaid. He asked accused two to four times for making the payment of money but he failed. Then he issued demand notice. That notice was received by him and he also replied. This verification statement is to be read along with documents, which are produced with the complaint. The documents include, cheque issued by the accused, memos issued by both the Banks, particularly drawee Bank, to the effect that the cheque was being returned unpaid for want of sufficient funds.

8. Taking into consideration the documents filed in support of the complaint, in my considered opinion, verification statement is complete to make out a case u/s 138 of the Negotiable Instruments Act. Merely because the complainant stated in the verification statement that he did not remember the date on which notice was issued to the accused and the date on which reply was given by accused, it cannot be said that the complainant has failed to make out a case u/s 138 of Negotiable Instruments Act.

9. Taking into consideration all the facts and circumstances, I find no illegality or irregularity in the impugned order passed by the Magistrate for issuing process. The authorities in case of M.S. Narayana Menon (supra) does not come to the rescue of the accused. I find no substance in the contentions raised on behalf of the accused.

10. For the aforesaid reasons, the applications stand dismissed.

