

(2012) 06 BOM CK 0053

In the Bombay High Court

Case No : Criminal Writ Petition No. 909 of 2011

Rajkumar Harwani

APPELLANT

Vs

Sagar Tolwani and State of Maharashtra

RESPONDENT

Date of Decision : 13-06-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 192, 200, 200(1), 202, 202(1)
Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2012) BomCR(Cri) 251 : (2012) 114 BOMLR 2307 : (2012) CriLJ 3450

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

Bench : Single Bench

Advocate : P.K. Lakhotiya, for the Appellant; A.D. Kasliwal, Advocate for Respondent No. 1 and Mr. K.J. Ghute-Patil, Assistant Public Prosecutor for Respondent No. 2/State, for the Respondent

Final Decision : Dismissed

Judgement

T.V. Nalawade, J.—The petition is filed for quashing the order of issue process made in S.C.C. No. 5520/2010 by 7th Judicial Magistrate, First Class, Aurangabad. In a private complaint filed by respondent No. 1 for the offence punishable u/s 138 of the Negotiable Instruments Act, the order under challenge is made. Both the sides are heard. The order is challenged only on one ground viz. non compliance of the provision of section 202 (1) of Criminal Procedure Code. The J.M.F.C. has issued process after examining the complainant u/s 200 of Cr.P.C. and order of issue process is made on the basis of this examination and the relevant documents filed by the complainant.

2. By way of amendment which came into effect from 23.6.2006 underlined portion came to be added in section 202 (1) of Cr.P.C. :-

202. Postponement of issue of process.- (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him u/s 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his

jurisdiction, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath u/s 200.

3. Section 202 is a provision which enables the Magistrate taking cognizance of an offence to make some inquiry himself or direct police to make investigation for the purpose of ascertaining truth or falsehood in the allegations made in the complaint. Before the aforesaid amendment, there was discretion to the Magistrate with regard to postponing issue of process for inquiry even in cases, where the accused was residing at a place beyond the area of the local jurisdiction of the Magistrate. Due to the amendment, two classes of accused are created viz. the accused residing within the local jurisdiction of the Magistrate and residing at a place beyond the local jurisdiction of the Magistrate.

4. The cases cited by both the sides in the present matter show that different benches of this High Court have expressed different views with regard to the aforesaid amended provision. In Criminal Application No. 2640/2009 (Capt. S.C. Mathur & Anr. Vs. M/s. Electronic Lab & Ors), which was pending at the Principal Seat, this Court has expressed the view that the aforesaid procedure is mandatory in nature and the Magistrate must make inquiry and follow the aforesaid procedure. This decision was given on 8.1.2010. In this decision, this Court referred order passed by Hon''ble Apex Court in Criminal Appeal No. 984/2009 (K.T. Joseph Vs. State of Kerala & Anr.) decided on 8.5.2009. One reported case of Rosy and Another Vs. State of Kerala and Others, is also referred.

5. In the case reported as 2010 All MR (Cri) 3168 [Shri. Bansilal S. Kabra Vs. Global Trade Finance Ltd. & Anr.] another bench of this Court has expressed exactly contrary view in the decision dated 9.7.2010. This bench has referred both the cases of the Hon''ble Apex Court cited supra, which were considered by the previous bench and the aforesaid case of another bench viz. Capt. S.C. Mathur's case is also considered by this bench.

6. It was submitted that in view of the aforesaid conflicting decisions, the aforesaid matter is referred to larger bench. It was submitted for the petitioner that the decision of Shri. Bansilal's case cited supra decided by this Court is challenged in Hon''ble Apex Court and stay is granted by Hon''ble Apex Court in that case. In the same case, the bench had referred the matter to Hon''ble Chief Justice for constitution of larger bench to resolve the issue.

7. In view of the aforesaid circumstances, this Court is required to consider as to whether the proceeding of S.C.C. No. 5520/2010, in which the order of issue process is made, needs to be stayed. For the respondent - original complainant, one case reported as 2012 All MR (Cri) 557 [ASR Systems Private Ltd. & Anr. Vs. Kimberly Clark Hygiene Products Pvt. Ltd. & Anr.] was cited. Another bench of this Court has observed that though the aforesaid issue is referred to larger bench, similar matters cannot be kept pending nor the proceedings can be stayed. This bench has observed that the amended provision is directory in nature and simply because the Magistrate has not recorded statements of several witnesses before issuing process, the process cannot be quashed. It is further observed that when the Magistrate considers the contents of the complaint, the examination of complainant made as per Section 200 of Cr.P.C. and other documents produced by the complainant, such consideration amounts to preliminary inquiry and if the Magistrate is satisfied on the basis of such material that prima facie case is made out, process can be issued.

8. This Court is inclined to accept the view of the bench expressed in the case of ASR Systems Private Ltd. cited supra. Even if, it is presumed that the Magistrate should postpone the order of issue process and go for inquiry as provided in amended provision, it becomes necessary to ascertain as to what kind of inquiry is expected in the amended provision. Section 202 (2) of Cr.P.C. provides as under :-

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

Only when the offence complained is triable exclusively by the Court of Sessions, the Magistrate is expected to examine all the witnesses of the complainant on oath. The cases which are triable by the Court of Sessions are more serious in nature and so distinction is made in this provision between the cases which are triable by the Court of Magistrate and the Court of Sessions. Discretion is given to the Magistrate when a case is triable by Magistrate and it is up to him to decide as to whether there is need to take evidence of witnesses of the complainant on oath. This provision shows that it is only in respect of the witnesses of the complainant. In a private complaint which is not covered by the proviso to section 200 of Cr.P.C., the Magistrate is expected to examine the complainant upon oath, if he is taking cognizance of the offence mentioned in the complaint. Section 200 of Cr.P.C. shows that it is up to the complainant either to produce his witnesses for the examination or not to produce the witnesses at that stage. In view of this procedure, when the Magistrate undertakes inquiry u/s 200 (1) of Cr.P.C., he is to take decision about the necessity to examine the witnesses of the complainant on oath in cases which are not exclusively triable by the Court of Sessions.

9. The provision of section 202 (2) of Cr.P.C. was not amended, when the provision of section 202 (1) was amended by the legislature. Thus, even after the aforesaid amendment, the Magistrate is expected to decide the nature of inquiry which is to be made. Such inquiry is required to be made to ascertain truth or falsity of facts and on the basis of this inquiry, the Magistrate is expected to form opinion with regard to the issue of process. The provision of section 204 (1) of Cr.P.C. shows that if the Magistrate taking cognizance of an offence forms opinion that there is sufficient ground for proceeding, he is expected to issue process as provided in section 204 of Cr.P.C.

10. The purpose of examination of complainant u/s 200 of Cr.P.C. is also to ascertain as to whether there is prima facie case against the accused and also to prevent issue of process against the accused on a complaint which is either false or vexatious or intended to harass such a person. In the case reported as Nirmaljit Singh Hoon Vs. The State of West Bengal and Another, , the Apex Court has observed that the purpose behind section 200 of Cr.P.C. is to find out as to whether there is or is not sufficient ground for proceeding against the accused. This provision is applicable against all accused irrespective of the fact, whether the accused is residing within local jurisdiction of the Magistrate or he is residing beyond the local jurisdiction of the Magistrate. If the inquiry u/s 202 (1) of Cr.P.C. is mandatory, if the accused is residing beyond local limits of Magistrate, it can be said that something more is expected from Magistrate than the examination of the complainant and his witnesses, if the witnesses are produced as provided u/s 200 of Cr.P.C. As section 202 (2) shows that it is not mandatory on the part of Magistrate to examine the witnesses of the complainant on oath, if the case is not triable exclusively by the Court of Sessions, it can be said that on the basis of the material available, the Magistrate can make inquiry and form opinion for issuing process. The scope of the inquiry u/s 202 of Cr.P.C. is discussed by Hon''ble Apex Court in the case reported as Mohinder Singh Vs. Gulwant Singh and others, . The Apex Court has observed that no detailed inquiry is necessary and the inquiry has limited scope, only to find out as to whether there is sufficient material to proceed against the accused, to form opinion u/s 204 of Cr.P.C.

11. The question arises as to whether in a particular case, the Magistrate has made such inquiry. When the Magistrate wants to give direction to police or other person to make investigation u/s 202 (1) of Cr.P.C., it can be said that he is expected to pass some order in that regard. When the Magistrate wants to make inquiry himself u/s 202 (1) of Cr.P.C., then it can be ascertained from the record and from the order of issue process made by Magistrate, as to whether he had made inquiry. The aforesaid provision shows that at the time of taking cognizance of an offence and at the time of making order of issue process, the Magistrate applies judicial mind. The provision shows that the procedure is laid down for two things viz. (i) for ascertaining the truth or falsehood in the allegations, so that interest of the accused who is not participating in the proceeding at this stage are protected and (ii) to ascertain as to whether there is

sufficient material to make out prima facie case for the offence mentioned in the complaint which is necessary to form opinion as required in section 204 of Cr.P.C. If the order of issue process shows that the Magistrate has considered the material like examination of the complainant and relevant documents, if any, to ascertain aforesaid things, then it can be inferred that the Magistrate has made the inquiry expected u/s 202 (1) of Cr.P.C.

12. In the present case, the order shows that the Magistrate considered not only the examination of the complainant made u/s 200 of Cr.P.C., but also the relevant documents. In a case like present one, the other provisions like provisions of statutory presumptions made available under Negotiable Instruments Act and General Clauses Act need to be kept in mind. Almost in respect of all the documents which are required to be considered, there are provisions enabling Court to raise presumptions. In view of these provisions, the Magistrate cannot be expected to call witnesses to examine them on oath in relation to such relevant documents. Thus, in a case like present one, if the Magistrate considers the aforesaid material and makes order of issue process, it can be inferred that necessary inquiry was made by the Magistrate.

13. One more point was argued for the accused. It was submitted that the examination of the complainant u/s 200 of Cr.P.C. was not properly made by J.M.F.C. A copy of the said examination is on record and it shows that on a form, which contains printed or print out matter regarding necessary particulars of offence u/s 138 of the Negotiable Instruments Act, the information is collected by J.M.F.C. from the complainant. Thus, the relevant information is obtained in a format. Reliance was placed on one case reported as Suresh Estate Pvt. Ltd. and Others Vs. Municipal Corporation of Greater Mumbai and Others, . The observations made by a bench of this Court show that right of the complainant u/s 200 of Cr.P.C. is considered and it is observed that the examination cannot be curtailed by using such printed format. The facts show that the point of vicarious liability of persons like Chairman and Directors of the Company was involved and information was not sought in respect of these persons as required u/s 141 of Negotiable Instruments Act. In view of these circumstances, some observations were made by one bench of this Court regarding the aforesaid practice. When the necessary information in respect of the ingredients of the offence is collected and for that, a format is prepared, no fault can be found with such practice. What is required is the examination of complainant and the purpose for the same is already mentioned by this Court. The facts of the present case are different and the examination is on all the relevant points of the present matter. So, this Court holds that the accused cannot get any benefit due to the use of such format in the present matter. The aforesaid discussion shows that it is not possible to use the writ jurisdiction in the present matter. Further, the order of issue process could have been challenged by filing appropriate proceeding like revision in Sessions Court. In view of these circumstances, the petition stands rejected.