**(2015) 06 BOM CK 0203**

**In the Bombay High Court**

**Case No :** Criminal Application [APL] No. 57 of 2013 & Criminal Application [APL] No. 58 of 2013 & Criminal Application [APL] No. 71 of 2013

Satish — APPELLANT

Vs

State of Maharashtra and Others — RESPONDENT

**Date of Decision :** 18-06-2015

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 200, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 142
Penal Code, 1860 (IPC) — Section 406, 420

**Citation :** (2015) 06 BOM CK 0203

**Hon'ble Judges :** P.B. Varale, J

**Bench :** Single Bench

**Advocate :** Shyam Dewani, for the Appellant; A.H. Laddhad and T.H. Udeshi, APPs., Advocates for the Respondent

## Judgement

P.B. Varale, J—Heard.

2. ADMIT.

3. By consent of the learned counsel for the parties, the matter is taken up for final disposal forthwith.

4. By this application, the applicant/accused is challenging the judgment and order passed by the learned District Judge-8 and Additional Sessions Judge, Nagpur, dated 25.10.2012 in Revision Application No. 720/2011, thereby dismissing the revision preferred by him in challenge to the order passed by the learned 2nd Joint Civil Judge, Junior Division and Judicial Magistrate First Class (Special Court of Negotiable Instrument Act), Nagpur, dated 28.09.2011 in Summary Criminal Case No. 19002/2011, thereby issuing process against the applicant.

5. The facts giving rise to the present application can be summarized as follows:

It is the case of the applicant that he is Proprietor of M/s. Yash Infotech System and running business of sale and purchase of computers and its spare parts. Though, the applicant hails from the State of Bihar, since last several years he is in Nagpur and settled his business at Nagpur. In the year 2010, the non-applicant No. 2/original complainant namely Dinesh Gupta and his brother Anil Gupta came in contact with the applicant. It was informed to the applicant that Gupta brothers are also dealing in the business of sale and purchase of computers and its spare parts. Non-applicant No. 2 and his brother offered business dealing to the applicant of purchasing computers and its spare parts on credit basis from them. The applicant accepted the offer and it was the practice accepted between the parties that the applicant would issue post dated cheques as security against purchase of the materials i.e. computers and its parts and after making payment, would receive back the cheques. Some time in January, 2011, the applicant was required to go to Kolkata to see the minor son of his brother, who was ailing. After reaching Kolkata and having stay there for some days, the applicant himself was suffering from health issue namely stomach infection and he was advised bed rest. Due to such health issue, the applicant was constrained to have over stay at Kolkata and there was a communication gap due to this difficulty. The applicant submitted that the non-applicant No. 2, on false and frivolous allegations implicated him in the offence punishable under sections 406 and 420 of the Indian Penal Code. The non-applicant No. 2/ complainant alleged in the complaint lodged with the police station that the applicant had failed to make payment to the tune of Rs. 10,66,000/- to him against the goods supplied to the applicant. The non-applicant No. 2 initiated a criminal case against the applicant under Section 138 of the Negotiable Instruments Act. It is the case of the applicant that the brother of non-applicant No. 2 Anil Gupta also initiated criminal case against the applicant by lodging report at Dhantoli police station alleging that the applicant has committed offence under Sections 406 and 420 of the I.P.C. The non-applicant No. 2 alleged that a cheque to the tune of Rs. 1,900/- bearing No. 556201, dated 08.01.2011 drawn on Indus-Ind Bank, Ramdaspeth branch, Nagpur was issued by the applicant and on presentation of the said cheque at Nagpur Nagrik Sahakari Bank, Lakadganj Branch, Nagpur, an intimation was received through a written memo informing that the account is closed and therefore, payment could not be made. The non-applicant No. 2/complainant issued notice to the applicant on 10.07.2011. Though, the notice was received by the applicant on 11.07.2011, the applicant failed to comply with the demand and as such was indulged in an act of offence punishable under Section 138 of the N.I. Act. It was the submission of the applicant that on the same premise, the non-applicant No. 2 and his brother fled total 11 complaints against the applicant in respect of dishonor of the cheque.

6. The learned Magistrate on receiving complaints, issued process against the applicant by order dated 28.09.2011 and being aggrieved by the said order of issuance of process, the applicant preferred revision before the learned District Judge-8 and ASJ, Nagpur. According to the applicant, the learned District Judge

 

failed to consider the material grounds raised by the applicant in revision as also failed to consider the judgments of the Hon''ble Apex Court as well as other Courts and dismissed the revision applications.

7. Mr. Dewani, the learned counsel for the applicant vehemently submitted that non-applicant No. 2/complainant and his brother with an ill motive and by leveling false allegations, lodged the reports against the applicant in police station and at the same time also fled the criminal cases against the applicant under the provisions of the N.I. Act. The learned counsel for the applicant submitted that the non-applicant No. 2 and his brother had approached the applicant and on assurance given by the non-applicant No. 2, the applicant started business dealings with them. The learned counsel submitted that it was the usual practice between the parties that the applicant would purchase the material from the non-applicant No. 2 on credit basis, the applicant would issue post dated cheque as security and within shortest possible span, the applicant would make the payment of purchases and take the post dated cheques back. The learned counsel for the applicant further submitted that due to some unforeseen difficulties of the applicant i.e. health problem, the applicant was constrained to over stay at Kolkata and the communication gap between the applicant and his employees as well as the business associates has resulted in facing false criminal cases initiated at the instance of the non-applicant No. 2 and his brother.

8. Mr. Dewani, the learned counsel for the applicant, by inviting my attention to the material placed on record submitted that the learned Magistrate has mechanically passed the order of issuance of process and the learned Revisional Court also failed to consider the material grounds. The submission of Mr. Dewani, learned counsel for the applicant was the cheque in question, as alleged by the applicant, was issued in the name of M/s. Datatronics Systems Pvt. Ltd. The criminal case/complaint submitted before the learned Magistrate through the non-applicant No. 2/complainant is in his personal capacity. It is submitted by the learned counsel for the applicant that the learned Magistrate ought to have verified whether the complainant was holder in due course of the instrument at the relevant time. Such being the requirements of law and if the material placed on record was wholly insufficient to satisfy the learned Magistrate, the learned Magistrate ought not to have issued the process against the applicant. Mr. Dewani, the learned counsel for the applicant then submitted that as the learned Magistrate has failed to consider this material aspect, the applicant preferred revision before the learned District Judge raising said ground as well as other grounds viz. on the same premise the non-applicant No. 2 and his brother lodged reports at police station inviting action against the applicant alleging that the applicant has committed offence. The submission was the applicant is subjected to double jeopardy. The learned counsel Mr. Dewani submitted that the learned Revisional Court has also failed to consider the material grounds raised by the applicant and only on mechanical consideration, dismissed the revision. Mr. Dewani, the learned counsel for the applicant submitted that the proceedings

 

against the applicant is nothing but an abuse of process of law and as such this Court by invoking the powers under Section 482 of Criminal Procedure Code may allow the present application and prevent the said abuse of process of law.

9. Per contra, the learned Assistant Government Pleaders for the non-applicant No. 1/State and Mr. Masood Sharif, learned counsel for the non-applicant No. 2 support the orders challenged in the present applications.

10. Mr. Sharif, the learned counsel for non-applicant No. 2 vehemently submitted that the applicant himself had indulged in misleading the non-applicant No. 2. The learned counsel for the non-applicant No. 2 submitted that the applicant was purchasing the material from the non-applicant No. 2 and though initially the applicant was regular in making payment, subsequently, the applicant started making the payment belatedly. The learned counsel for non-applicant No. 2 then submitted that on 04.01.2011, the applicant had attended non-applicant No. 2 in the office of his brother and informed the non-applicant No. 2 that one of his relative is ill and as such he is proceeding to Gujarat to attend him. The non-applicant No. 2 on verifying the record found that the applicant had purchased the material to the tune of Rs. 10,66,000/- during the period from 26.11.2010 to 03.01.2011 and he had not issued any cheque. On an enquiry, it was revealed that the applicant by playing mischief caused loss to the non-applicant No. 2 to the tune of Rs. 10,66,000/-. He further submitted that when the non-applicant No. 2 demanded the outstanding dues, the applicant issued cheque amounting to Rs. 1,900/- and on presenting the cheque, the same was returned from the banker informing that the account of the applicant is closed and therefore, the payment could not be made. Accordingly, non-applicant No. 2 issued a notice to the applicant and though the notice was received by the applicant, he failed to comply with the demand and as such committed an offence under Section 138 of the N.I. Act. Mr. Sharif, the learned counsel for the non-applicant No. 2 then submitted that the learned Magistrate, on receiving the complaint and the material and on hearing the counsel for the complainant, was satisfied with the prima facie material showing that the applicant had issued a cheque and the same was dishonoured and in spite of issuance of notice within the stipulated period, the applicant failed to comply with the demand and accordingly, issued process against the applicant. The learned counsel submitted that the learned Magistrate was not expected to conduct a detailed enquiry. He submitted that the applicant had raised same grounds before the Revisional Court and the Revisional Court on considering those grounds found that the complainant was the holder in due course of the cheque in question and further found that the complaint has been fled by the a natural person representing juristic person and accordingly, dismissed the revision.

11. Mr. Sharif, the learned counsel for non-applicant No. 2 submitted that though assuming but not admitting that there was some defect in the complaint fled by the non-applicant No. 2, the said defect is a curative defect and it can be rectified during the course of trial. The learned counsel submitted that the

 

applicant under the guise of an application under Section 482 of Cr.P.C. is preferring second revision application against the order passed by the learned Magistrate and such course is not at all sustainable. He further submitted that in view of various judgments of this Court as well as the Apex Court, powers under Section 482 of Cr.P.C. are to be exercised sparingly and the party under the name of preventing abuse of process of law cannot stop the appropriate forum/ Court from conducting the trial. Mr. Sharif, the learned counsel for non-applicant No. 2 then submitted that the applicant can put forth the material before the learned trial court in the trial, but the applicant cannot put the trial to the end at the threshold on unsustainable and hyper technical grounds.

12. On hearing the learned counsel for the parties at length and on a perusal of the material placed on record, the following points need consideration:

1] Whether the material placed on record show that there was a practice existing between the parties, who had entered in the business dealing, to issue post dated cheque as security?

2] Whether the complainant i.e. non-applicant No. 2 was payee or holder in due course of the cheque in question?

13. Though, Mr. Sharif, the learned counsel for the non-applicant No. 2 vehemently submitted that there was no practice between the parties of issuing post dated cheques against the purchase of material as security, perusal of the material placed on record show that the non-applicant No. 2, who had lodged report at Dhantoli police station against the applicant alleging offence under Sections 406 and 420 of the Indian Penal Code, stated in the report that the applicant had assured to give post dated cheque as security and in the initial period such cheques issued by the applicant were honoured and the applicant was paying regularly. In the report, it is stated that the non-applicant No. 2/ complainant had purchased the material to the tune of Rs. 10,66,000/- and had not issued any security cheque towards this amount. Thus, the report lodged at the instance of non-applicant No. 2 show that the non-applicant No. 2 himself admits that the applicant had issued cheques as security against the purchase of material.

14. Insofar as other point namely whether the complainant was payee and holder in due course is concerned, perusal of the material show that in the present application the cheque in question to the tune of Rs. 1,900/- was issued in the name of M/s. Datatronics Systems Pvt. Ltd. It was the submission of Mr. Dewani, the learned counsel for the applicant that no material was placed on record to show that the non-applicant No. 2, who claims to be the Director of said company, was authorized by the Company to lodge complaint on behalf of the company. It was the submission of Mr. Dewani, the learned counsel that the non-applicant No. 2/complainant could not have fled the complaint in individual capacity. While dealing with these submissions, the learned revisional Court observed that "it is trite to say that complaint has to be a corporeal person who

 

is capable of making a physical appearance in the Court. If the complainant is made in the name of a incorporeal person like a company, it is necessary that a natural person represents such juristic person in the court. Therefore, in the instant case, the company being de jure complainant, its Director being de-facto complainant can represent the complaint." The submission of the learned counsel for the applicant was the view taken by the learned Revisional Court was wholly unsustainable on the backdrop of the facts of the matter and the judgments of the Apex Court. He submitted that it is not in dispute that an incorporeal person like the Company cannot make a physical appearance and a natural person represents such juristic person in the Court. Mr. Dewani, learned counsel submitted that it was necessary for the complainant to show that the complainant was representing the juristic person i.e. Company and he was authorized to do so.

15. Mr. Dewani, learned counsel for the applicant placed heavy reliance on the judgments of the Apex Court reported in Milind Shripad Chandurkar Vs. Kalim M. Khan and Another, AIR 2011 SC 1588 : (2011) 2 BC 542 : (2011) 102 CLA 128 : (2011) CriLJ 1912 : (2011) 3 CTC 234 : (2011) 3 JT 138 : (2011) 2 RCR(Civil) 687 : (2011) 2 RCR(Criminal) 568 : (2011) 3 SCALE 285 : (2011) 4 SCC 275 : (2011) 2 SCC(Cri) 208 : (2011) AIRSCW 1773 . It will be useful to refer to this judgment for our purposes. The Apex Court in this reported case on the backdrop of the fact namely the complainant claiming to be the Proprietor of firm namely Vijaya Automobiles, proceeded against the accused alleging offence under Section 138 of the N.I. Act. The Apex Court observed that the complainant, who was appellant before the Apex Court, did not produce any documentary evidence that he was the Proprietor of Vijaya Automobiles. Then it was observed that the complainant stated only in his complaint that he is the owner of Vijaya Automobiles and accused issued one cheque in the name of Vijaya Automobiles, the Apex Court then found that the accused had raised the issue at every stage and then by referring to its earlier judgment, the Apex Court observed that?

"19. Section 142 provides for taking cognizance of the offence notwithstanding anything contained in Cr.P.C. which reads as under:

"(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, he holder in due course of the cheque."

(Emphasis added)

20. This Court in Shankar Finance and Investments Vs. State of Andhra Pradesh and Others, AIR 2009 SC 422 : (2008) 4 BC 523 : (2008) 10 SCALE 654 : (2008) 8 SCC 536 dealt with the issue involved herein elaborately and held that where the "payee" is a proprietary concern the complaint can be fled (i) by the proprietor of the proprietary concern describing himself as the sole proprietor of the "payee"; (ii) the proprietary concern describing itself as the sole proprietary concern represented by its proprietor; and (iii) the proprietor or the proprietary

 

concern represented by the Attorney Holder under the power of attorney executed by the sole proprietor. However, it shall not be permissible for an Attorney Holder to file the complaint in his own name as if he was the complainant. He can initiate criminal proceedings on behalf of the principal."

16. The Apex Court further observed that the appellant cannot claim to be the payee of the cheque nor he can be the holder of the cheque in due course unless he establishes that the cheque had been issued to him or in his favour or that he is the proprietor of the concern and being so, he could also be payee himself and thus, entitled to make the complaint. The Apex Court further observed that no material was placed on record to prove that the appellant had nexus or connection with the firm namely Vijay Automobiles and mere statement in the affidavit in this regard is not sufficient to meet the requirement of law.

17. Mr. Dewani, learned counsel for the applicant also placed reliance on the judgment of the Apex Court reported in National Small Industries Corporation Ltd. Vs. State (NCT of Delhi) and Others, AIR 2009 SC 1284 : (2008) 147 CompCas 11 : (2009) CriLJ 1299 : (2008) 13 JT 428 : (2009) 1 SCC 407 : (2009) AIRSCW 713 : (2008) 8 Supreme 629 . The relevant observation of the Apex Court in the said reported case at paragraphs 10 and 11, read thus:

"10. The term ''complainant'' is not defined under the Code. Section 142 NI Act requires a complaint under section 138 of that Act, to be made by the payee (or by the holder in due course). It is thus evident that in a complaint relating to dishonour of a cheque (which has not been endorsed by the payee in favour of anyone), it is the payee alone who can be the complainant. The NI Act only provides that dishonour of a cheque would be an offence and the manner of taking cognizance of offences punishable under section 138 of that Act. However, the procedure relating to initiation of proceedings, trial and disposal of such complaints, is governed by the Code. Section 200 of the Code requires that the Magistrate, on taking cognizance of an offence on complaint, shall examine upon oath the complainant and the witnesses present and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses. The requirement of section 142 of NI Act that payee should be the complainant, is met if the complaint is in the name of the payee. If the payee is a company, necessarily the complaint should be fled in the name of the company. Section 142 of NI Act does not specify who should represent the company, if a company is the complainant. A company can be represented by an employee or even by anon-employee authorized and empowered to represent the company either by a resolution or by a power of attorney.

(emphasis supplied)

11. Section 138 NI Act mandates that payee alone, whether a corporeal person or incorporeal person, shall be the complainant. Section 200 of the Code contemplates only a corporeal person being a complainant. It mandatorily requires the examination of the complainant and the sworn statement being

 

signed by the complainant. If section 142 of NI Act and section 200 of the Code are read literally, the result will be: (a) the complainant should be the payee of the cheque; and (b) the complainant should be examined before issuing process and the complainant''s signature should be obtained on the deposition. Therefore, if the payee is a company, an incorporeal body, the said incorporeal body can alone be the complainant. The mandatory requirement of section 200 of the Code is that a Magistrate taking cognizance of an offence on complaint, shall examine upon oath the complainant, and that the substance of such examination reduced to writing shall be signed by the complainant. An incorporeal body can obviously neither give evidence nor sign the deposition. If literal interpretation is applied, it would lead to an impossibility as an incorporeal body is incapable of being examined. In the circumstances, a harmonious and purposive interpretation of section 142 of NI Act and section 200 of the Code becomes necessary. Section 142 only requires that the complaint should be in the name of the payee. Where the complainant is a company, who will represent the company and how the company will be represented in such proceedings, is not governed by the Code but by the relevant law relating to companies. Section 200 of the Code mandatorily requires an examination of the complainant; and where the complainant is an incorporeal body, evidently only an employee or representative can be examined on its behalf. As a result, the company becomes a de jure complainant and its employee or other representative, representing it in the criminal proceedings, becomes the de facto complainant. ....."

(emphasis supplied)

18. Mr. Dewani, learned counsel for the applicant also placed reliance on the following judgments:

1] Joseph Vilangadan Vs. Phenomenal Health Care Services Ltd. and Another, (2011) 1 ALLMR 709 : (2011) 2 BC 471 : (2011) CriLJ 531

2] Ramkrishna Urban Cooperative Credit Society Ltd. Vs. Shri Rajendra Bhagchand Warma, (2010) 2 BC 481

3] Sudhir Kumar Bhalla Vs. Jagdish Chand, etc. etc., AIR 2008 SC 2407 : (2008) 3 CLT 221 : (2008) CriLJ 3004 : (2008) 6 JT 549 : (2008) 6 SCALE 626 : (2008) 7 SCC 137 : (2008) AIRSCW 3631

4] M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, AIR 2006 SC 3366 : (2006) 3 BC 433 : (2006) 132 CompCas 450 : (2006) 6 CompLJ 39 : (2006) CriLJ 4607 : (2006) 3 CTC 730 : (2006) 6 JT 72 : (2006) 6 SCALE 393 : (2006) 6 SCC 39 : (2006) 3 SCR 124 Supp : (2006) AIRSCW 4652 : (2006) 5 Supreme 547

5] Goa Handicrafts, Rural and Small Scale Industries Development Corporation Ltd. Vs. Samudra Ropes Pvt. Ltd. and Others, (2006) 2 BC 278 : (2005) CriLJ 4072 .

19. On a perusal of the material placed on record, which show that the non-

 

applicant No. 2/complainant had placed no material on record to satisfy the requisites of the complainant being the payee or holder of the cheque in due course, in my opinion, the learned counsel for the applicant has made out a case warranting interference of this Court in exercise of powers under Section 482 of Code of Criminal Procedure. In view of above considerations, the order passed by the revisional Court thereby dismissing the revision as well as the order of the learned Magistrate thereby issuing process against the applicant, are unsustainable. The criminal application thus deserves to be allowed.

20. In the result, the Criminal application is allowed.

The judgment and order passed by the learned District Judge-8 and Additional Sessions Judge, Nagpur dated 25.10.2012 in Revision Application No. 720/2011 and the order passed by the learned Judicial Magistrate, First Class (Special Court of N.I. Act), Nagpur, dated 28.09.2011 in Summary Criminal Case No. 19002/2011, are hereby quashed and set aside.

21. The criminal application is disposed of accordingly.