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**(2016) 06 BOM CK 0097**

**In the Bombay High Court**

**Case No : Criminal Writ Petition No. 1046 of 2002**

Shri Ramesh J. Chauhan

APPELLANT

Vs

Shri Merwan K. Irani and another

RESPONDENT

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**Date of Decision : 09-06-2016**

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 200, 482  
Penal Code, 1860 (IPC) — Section 34, 406, 420

**Citation :** (2016) ALLMRCri 3073 : (2016) 4 BomCR(Cri) 673

**Hon'ble Judges :** Smt. Sadhana S. Jadhav, J.

**Bench :** Single Bench

**Advocate :** Mr. Arshad Shaikh, Senior Counsel a/w Mr. Netaji Gawade, i/b M/s Sanjay Udeshi & Co, for the Appellant; Ms. Sharan Patole i/b Ms. Kirti Purohit, Advocates, Mr. A.R. Patil, APP, for the Respondent

**Final Decision :** Allowed

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## Judgement

Smt. Sadhana S. Jadhav, J.—; Heard respective counsel. Petitioner herein is original accused no. 2 in R.C.C. No. 9 of 2002 which was initiated by present Respondent no. 1. Petitioner herein questions the correctness and the validity of the order of issuance of process against him by Judicial Magistrate First Class, Dahanu for offence punishable under section 406, 420 r/w 34 of Indian Penal Code vide Order dated 17/01/2002.

2. Being aggrieved by the said order, Petitioner herein has filed Criminal Revision Application No. 25 of 2002 before Court of Additional Sessions is Judge at Palghar. Learned Additional Sessions Judge Palghar vide Order dated 03/07/2002 has been pleased to dismiss Revision Application. Hence, this Writ Petition.

3. Present Respondent no. 1 had filed a complaint in the court of Judicial Magistrate First Class, Dahanu on 17/01/2002, alleging therein that she is an entrepreneur. According to her, original accused no. 1 i.e. Smt. Uma Chavan was also into manufacturing of food products in the name and style of "Parle Food Products". That she had requested the complainant to sell pickles manufactured

by her and create a market for her in America. She had also requested her to create market for her food products. She had given samples to her which were of high quality. Complainant had admitted to market the said food products, however, the said food products were of sub-standard quality and therefore could not be sold in the American market. It is alleged that for creating market for food products, original accused no. 1 had accepted a deposit of Rs. 4 Lakhs from the complainant. Since the goods could not be sold in the open market, complainant had allegedly requested original accused no. 1 to return the deposit given by her. It is alleged that initially original accused no. 1 had given evasive answers and had refused to return the said deposit. That subsequently when the complainant persuaded the accused no. 1 to return the amount, accused no. 1 had disclosed to the complainant that the said amount has been given to present Petitioner who is in the business of production of Bisleri. She had directed the complainant to seek refund of the said amount from the present Petitioner and therefore, according to complainant, accused no. 1 had cheated her and had committed breach of trust by siphoning of the said deposit in favour of the present Petitioner. Hence, according to the complainant, both accused deserve to be prosecuted for offence punishable under section 406 & 420 r/w 34 of Indian Penal Code.

4. Learned Judicial Magistrate First Class had recorded the verification statement of the complainant on oath on 17/01/2002. Upon recording the verification statement, Judicial Magistrate First Class, Dahanu had issued process against the accused for offence punishable under section 406, 420 r/w 34 of Indian Penal Code.

5. Perused the copy of the complaint and the copy of the verification statement. It is a matter of record that allegations against present Petitioner made in the complaint do not find place in the verification statement. Moreover, it is the contention of the complainant that accused no. 1 had siphoned of the deposit in favour of the Petitioner, without her permission. It is not the case of the complainant that she had verified from the Petitioner that the said amount was entrusted in his favour. No overt act is attributed to the present Petitioner. It is a matter of record that in the complaint also, complainant has not even whispered that in the course of entire transaction, she had no communication with the present Petitioner or that she had entrusted the amount of Rs. 4 Lakhs to him or had verified the contention of the accused no. 1. The sanctity of recording the verification statement is that the contents of the complaint are reproduced on oath and the complainant stands by the contents of the complaint. It is clear that there is no whisper against present Petitioner in the verification statement. It is clear that learned Magistrate has failed to appreciate the discrepancy in the complaint and verification statement. The fact that there was material discrepancy in the complaint and the verification, learned Magistrate ought not to have issued process against present Petitioner. Issuance of process and continuance of criminal proceedings against present Petitioner, in view of the above mentioned fact would be abuse of process of Law.

6. Section 406 of Indian Penal Code contemplates the penalty for having committed criminal breach of trust. Section 405 of Indian Penal Code defines Criminal breach of trust as follows:

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

7. It is more than clear that none of the ingredients contemplated under section 405 of Indian Penal Code could be applicable to the present petitioner as there is no element of en-trustment in favour of present Petitioner.

8. Learned counsel for the Respondent no. 1 has placed reliance upon Judgment of Hon''ble Apex Court in the case of Rajesh Bajaj v. State NCT (A.I.R. 1999 Supreme Court 1216). She has placed implicit reliance on paragraph no. 9 of the said Judgment which reads thus:

"It is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so ism many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelled out in the complaint, is not the need at this stage. If factual foundation for the offence has been laid in the complaint the court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence. In State of Haryana v. Bhajan Lal (supra) this Court laid down the premise on which the FIR can be quashed in rare cases. The following observations made in the aforesaid decisions are a sound reminder (para 109 of AIR):

"We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice".

9. This Court cannot be oblivious of the fact that the prayer in above mentioned case was for quashing of complaint whereas the prayer in the ism present petition is for quashing of the order of issuance of process after cognizance was

taken by learned Magistrate. Learned Magistrate has been oblivious of the sanctity of the verification statement. Petitioner has challenged the order of issuance of process on the principal ground that there is non application of mind by learned Magistrate as he has ignored discrepancy between the complaint and verification.

10. This Court in the case of Arun Tikekar v. Sanatan Sanstha (2009 ALL MR (Cri.) 2545) has observed :

"In absence of even a reference to the role of applicants in verification statement, Magistrate could not have issued process against the accused/ applicants and hence impugned order as against the applicants is illegal."

11. This Court has placed reliance upon the Judgment of the Apex Court in the case of Sabitha Ramamurthy and Anr. v. R.B.S. Channabasavaradhya (2006) 10 SCC 581. It was held as under :-

"....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. In the event, ultimately, the prosecution is found to be frivolous or otherwise mala fide, the court may direct registration of case against the complainant for mala fide prosecution of the accused. The accused would also be entitled to file a suit for damages. The relevant provisions of the Code of Criminal Procedure are required to be construed from the aforementioned point of view."

12. This Court has also placed reliance on the Judgment of this Court in the case of Amarnath Baijnath Gupta & Anr. v. M/s. Mohini Organics Pvt. Ltd. & Anr (2009 ALL MR (Cri) 184). It was observed in para 22 thereof as follows :-

"22. On plain reading of section 200 of the said Code it appears that it is the obligation of the Magistrate to examine the complainant which means that the learned magistrate is obliged to put questions to the complainant for eliciting the truth from him. The said provision enjoins a judicial duty to be performed by the Judicial magistrate which requires an application of judicial mind. The said work of recording the statement cannot be done mechanically by simply filling cash details such as the date of cheque, name of the bank, date of intimation of dishonour of the cheque etc; in a format which is already kept ready. Generally, the complaints are drafted by the lawyers as per the instructions of the complainants. Thus, a complaint is the translated version or a formulated version made by the advocate on the instructions received from the complainant. Therefore, the examination of the complainant under section 200 by the learned Magistrate is very important. During the course of such examination the complainant tells the truth. In fact, the object of the learned Magistrate recording such statement is of eliciting the truth from the complainant ?."

13. This Court (Coram : Smt. Sadhana S. Jadhav, J.) in Criminal Writ Petition No. 1590 of 2011 on the basis of Judgments cited supra has held that the subjective

satisfaction of the Magistrate on the basis of examination on oath must be reflected in the order of issuance of process. The genuineness and truthfulness of contents of the complaint have to be substantiated in the examination on oath. It is in these premises that the petition deserves to be allowed. Hence, following order.

(i) Petition is allowed.

(ii) Order of issuance of process against present Petitioner in R.C.C. No. 9 of 2002 by Judicial Magistrate First Class, Dahanu vide Order dated 17/01/2002 is hereby quashed and set aside.

(iii) Rule is made absolute in the above terms.

(iv) Petition stands disposed of.