
(1981) 02 BOM CK 0026

In the Bombay High Court

Case No : Criminal Application No. 662 of 1980

Suresh Mohanlal Goradia

APPELLANT

Vs

Hiralal G. Thakkar and Others

RESPONDENT

Date of Decision : 04-02-1981

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 202(1), 202(2), 465
Evidence Act, 1872 — Section 114
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 11, 13, 3, 4, 5

Citation : (1982) 1 BomCR 117

Hon'ble Judges : R.S. Bhonsale, J

Bench : Single Bench

Advocate : V.P. Vashi, for the Appellant; N.M. Kachare, Public Prosecutor, Owen D'Souza and Manibhai R. Thakkar, for the Respondent

Final Decision : Allowed

Judgement

R.S. Bhonsale, J.—Even though this petition by the original accused was filed for quashing of the complaint and for setting aside the orders passed by the learned Metropolitan Magistrate, 10th Court, Andheri and also for setting aside the order passed by the Additional Sessions Judge, Greater Bombay in Criminal Revision Application No. 427 of 1979, subsequent events have confined the scope of this petition to a limited points i.e. as to whether the unwarned complaint by the complainant is fatal to the prosecution i.e. whether non-examination of the complainant on oath.....merely amounts irregularity u/s 465 of the Code of Criminal Procedure or whether it amounts to illegality and goes to the root of the matter. In order to appreciate the question which has arisen during the course of lengthy arguments on both sides, it may be convenient to briefly refer to the averments in the complaint as well as prosecution case presented in this criminal application in this Court.

2. One Hiralal G. Thakkar, the original complainant filed his complaint against the present petitioner original accused for having committed offences punishable u/s

3, 4, 5, 6 and 11 read with section 13 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as the Maharashtra Ownership Flats Act.) It is not necessary to refer to all averments made in the complaint in detail. It is sufficient at this stage to State that according to the complainant the present petitioner the original accused was the Promotor and was carrying on business in the name and style "M/s. Ghanshyam Investment". The said M/s. Ghanshyam Investment had constructed one building known as "Priti Apartments" consisting of ground and 6 floors. Each floor comprising 8 flats admeasuring about 477 sq. ft. The complainant had occupied Flat No. 34 at Priti Apartments, B-1 building at Riddhi Siddhi Nagar, Veera Desai Road, Andheri (West) Bombay, 400058. He had also paid before he came to occupy this flat Rs. 28,620/- towards the flat as also a sum of Rs. 1,035/- being the amount of legal charges, share money etc. The complainant occupied the flat on 1st December, 1975. However, even though the accused had given a understanding to the members like the original complainant of this Priti Apartments that he would get the society registered and issue the share certificates to him and others as he has collected the money, he has omitted to do so. This is the only grievance against the accused in the statement in question in paragraphs 8, 9, 10 and 11 of the original complaint. The complainant had referred to several grievance such as not making full and true disclosure of the title to the land on which the building is constructed, not giving the inspection of the plan and specification of the building built by the accused. The accused has also not entered into an agreement before accepting the necessary amount from him nor has he registered the society as per the provisions of section 4 of the said Act. It was further alleged that the accused as a Promotor of the society was enjoined in law to maintain a separate account of sums taken as advance or deposit and to be trustee thereof and disburse them for the purposes for which the amounts were given to him. It was further alleged that there is a breach committed by the accused u/s 5 of the Maharashtra Ownership Flats Act, 1963. It was also contended that as per the provisions of the said Act, the society was not registered and the property was not transferred in the name of the society. On these allegations a complaint came to be filed against the accused in the 10th Court Metropolitan Magistrate at Andheri on November 30, 1978. On behalf of the accused an application came to be filed on July, 12, 1979 for dismissed of the complaint as being barred under the provisions of section 468 of the Code of Criminal Procedure wherein it was stated that the offence mentioned in the complaint are punishable with imprisonment of one year and the period of limitation prescribed u/s 468 of the Code of Criminal Procedure for such offences is one year. According to the application made by accused it was further contended that on the showing of the complainant himself the offences were committed in the year 1974-75 and the complaint was filed on or about 30th November, 1978, therefore, the complaint is barred u/s 468 of the Code of Criminal Procedure. It was further stated in that application that no particulars were mentioned in the complaint and on that count also the complaint is bad in law. The material particulars such as when the agreement was

executed, when it required to be registered, when the conveyance was to be given and when the society was required to be registered were not given. The accused has, therefore, prayed for dismissal of the complaint on that count alone. The complainant by his reply dated August 10, 1979 stated that the complaint was not time barred, the offences in question alleged by the complainant were continuous offences and, therefore, the complaint cannot be said time barred. It was further stated that the Maharashtra Ownership Flats Act, 1963 does not prescribe any time limit for complying with the provisions of the Act. The person or persons contravening the provisions can be prosecuted in the cases of continuing offences.

3. On these rival submissions and on the nature of offences committed by the accused, the learned trial Magistrate by his order dated October 11, 1979, came to the conclusion that these offences were continuous offences and, therefore, the complaint was not barred under the provisions of section 468 of the Code of Criminal Procedure as alleged by the accused. In view of this finding recorded by the trial Magistrate of the Metropolitan Magistrate, 10th Court, Andheri, he rejected the application of the accused. This order which was challenged by the accused in the Court of Sessions and the learned Additional Sessions Judge by his order dated February 12, 1980 upheld the view taken by the learned trial Magistrate and held after referring to various authorities that in his opinion not even one of the conditions imposed on the accused have been complied with and, therefore, the offences stated in the complaint were covered by the provisions of section 472 of the Code of Criminal Procedure and as such the provisions of section 468 of the Code of Criminal Procedure were not attracted howsoever to the facts of this case. He further observed that "it is not necessary for the complainant to remind and make demands to the Promotor every time. The Promoter is under an obligation to carry out all the promises and the requirements imposed on him under the said Act. It is in this view I will not be able to accept the contentions of Mr. Ponda that the offences described in this complaint are not continuous, offence." In view of this finding arrived at by the learned Additional Sessions Judge, he rejected the revision application preferred by the original accused. It is these two orders which were the original subject matter are challenged by this petition filed under Article 227 of the Constitution of India and u/s 482 of the Code of Criminal Procedure.

4. Mr. Vashi the learned Counsel appearing for the accused had argued for more than a day, to persuade me to hold that the offences were complete on petitioner having committed breach of certain Acts at the relevant time as per the provisions of sections 3,4, 5 and 6 of the Maharashtra Ownership Flats Act. During the course of arguments and submissions made by both the Counsel it became apparent that it would be much better for appreciating the controversy if some evidence was recorded in this case. For example in the complaint in para 11, it was stated that the accused as a Promotor was required to maintain a separate account of sums taken as advance or deposit and to be trustee thereof and disburse them for the purposes for which the amounts were given to him.

The accused had thereby committed a breach u/s 5 of the Maharashtra Ownership Flats Act, 1963. The provisions of section 5 however, require the Promotor to maintain a separate account in any Bank of sums taken by him, from persons intending to take or who have taken flats, as advance or deposit, including any sums so taken towards the share capital for the formation of co-operative society or a company, or towards the outgoings (including ground rent if any, municipal or other local taxes, taxes on income, water charges, electricity charges, revenue assessment, interest on any mortgage of other encumbrances if any), and he shall hold the said moneys for the purposes for which they were given. In compliance with the requirements of the provisions of this section there were no averments made by the complainant in para 11 of the complaint as to how much amount he has advanced and at what point of time and whether the accused had or had not opened any account whatsoever. While Mr. Vashi contended that the petitioner had opened a separate account Mr. D'souza went on repelling the submissions by merely stating that no such separate account was maintained. At this stage the learned Counsel for the accused pointed out that even for deciding a pure question of law as to whether the offences under the said Act are completed offences or continuous offences, it would be better if some evidence was recorded. The record and proceedings were summoned for from the lower Court and while the learned Counsel Mr. Vashi was going through the record and proceedings he has suddenly realised that the original complaint which was filed in the Court of the learned Magistrate was not verified. After going through the entire record he could not find the examination of the complainant on oath. On the complaint itself the learned Magistrate has endorsed as follows :---

"Presented in person before me, today. Issue process under sections 3, 4, and 5 read with section 13 of the Maharashtra Ownership Flats Act, 1963 30-11-1978".

Mr. Vashi contended that from the entire record one does not find the examination of the complainant on oath and that was fatal to the case of the complainant. On the other hand Mr. D'Souza the learned Counsel after going through the record first took up a stand that what was written on page 9 of the record was in fact examination of the complainant on oath. He contended that if we read this as examination on oath of the complainant, though a cryptic one, it proves the fact that the learned Magistrate has used the words "presented in person" which indicated that it must be treated as examination on oath. Mr. D'Souza, however, was not able to explain the last two endorsements on that page which are to the effect of "punishing section 13 for one year imprisonment and fine or with both for failure to perform the duties of the promotor". The attention of Mr. D'Souza was drawn that this could not be the part of the examination of the complainant. Then Mr. D'Souza took up a stand that there must have been examination on oath of the complainant on some other papers which might have been misplaced. Mr. Vashi on the contrary stated that even if this is regarded as a complaint which in his opinion it was not, in the absence of

such a complaint being recorded on oath and was contrary to the mandatory provisions of section 200 of the Code of Criminal Procedure and the Court could not be said to have taken cognizance of the complaint u/s 200 of the Code of Criminal Procedure.

5. Mr. Vashi raised altogether a new point and that was whether in the absence of examination of the complainant on oath the learned Magistrate was justified in taking cognizance of the complaint? Mr. Vashi argued at great length that from the record it does not appear that the learned Magistrate verified the complaint by examining the complainant on oath at all. He also contended that this point being fatal in the complaint, the learned Magistrate should not have proceeded with this complaint and on this ground alone the complaint deserves to be dismissed.

6. Section 200 of the Code of Criminal Procedure states as follows :---

"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 writing and shall be signed by the complainant and the witnesses, and also by the Magistrate.

Provided

Provided"

This section is slightly different from the old section contained in the Code of Criminal Procedure, 1898. The expression "at once" in the old section has not been retained in the present section in order to avoid the futile controversy about the effect of receiving the complaint and examination of the complainant. However the mandate of law has been sufficiently secured even without the word and expression "at once". Even after this modification, the mandate of law that the complainant shall be examined on oath remains, and the Magistrate must administer oath before taking a complaint on file. In view of this mandatory provision in the section itself, it is bounden duty on the part of the Magistrate not only examine the complainant on oath but it also leaves no scope for any interpretation that the word "shall" can be read as "may". Mr. Vashi has in support of his submissions relied upon several authorities and they may be briefly referred to. He has also contended that the complaint was neither sworn nor signed by the complainant. In *Yakub Sheikh and Another Vs. The King*, , the Calcutta High Court has held that the Magistrate taking cognizance upon a complaint is bound under the provisions of section 200 of the Criminal Procedure Code to examine the complainant on oath at once, the failure to do this is fatal. Though no reasons are given in this judgment the learned Judge of the Calcutta High Court on plain reading of the said section has held as above. This view is further fortified by a judgement in *Dr. B.S. Vohra v. Risal Singh* 1974 C L J 177. In this case as soon as the complainant filed the complaint or presented before the Magistrate he passed an order as follows:

"Presented by the complainant along with the Counsel. Fix. 27-9-1971 for statement of the complainant."

In view of this order the complainant appeared on that day i.e. 27th September, 1971. Then the statement which was recorded on that day was not recorded on oath as required under the provisions of section 200 of the Code. It has held that examining the complainant without administering oath was in complete disregard to the opening part of the section 200 of the Criminal Procedure Code. In view of this fact the Court came to the conclusion that the examination of the complainant on oath before accepting the complaint is mandatory and failure to do so was not merely irregularity within the meaning of section 537 of the Code of Criminal Procedure, 1898, but an incurable illegality. A statement on oath falls in a distinct category and cannot be equated with a statement which may be made without taking the oath. Section 200 of the Code was amended by Act 26 of 1955 and the legislative object accomplished by providing that the complainant and the witness be examined on oath cannot be allowed to be superseded by the provisions contained in section 537 of the Code.

7. Mr. Vashi further relied on the decision reported in *Baijoo Mandal v. The Emperor*, 6 Calcutta Weekly Notes. This decision was naturally under the old Code and it was held that the law requiring the record u/s 200 to be made in a particular way, non compliance with its directions does not constitute a defect which is curable u/s 537 of the Code of Criminal Procedure. It was held that the law requires that record shall be made in a particular way, that is, that the substance of the examination shall be reduced to writing and that it shall be signed by the complainant, and also by the Magistrate. That being so, if the record has not been made in accordance with the law, it appears to us that it cannot be used as evidence of the statement made by the complainant. It is not necessary to further refer to the details of this case. A case which is direct on the point is reported in *P.N.S. Aiyar v. K.J. Nathan* AIR 1948 Mad 424. In this case though the complaint was in writing, when it was presented to the Court its contents were read over and explained to the complainant and he admitted the same to be correct on solemn affirmation administered in the presence of the learned Magistrate. According to the record of the proceedings before the lower Court, it was found that the complainant was not examined on oath by the Chief Presidency Magistrate. It was observed by the learned Judge of the Madras High Court that the examination of the complainant contemplated by section 200 signifies that the Magistrate ought to interrogate him on the allegations or averments contained in the complaint to test whether they are prima facie true or not. Where the contents of the complaint are admitted to be correct on solemn affirmation by the complainant, it cannot be said that this is an examination of the complainant either on oath or otherwise. All that the complainant has done in such a case is to state before the Court the averments mentioned in the complaint are true. The imperative necessity of examining a complainant on oath has not been dispensed with in the case of a Presidency Magistrate. Discretion given to him to dispense with the examination on oath

does not mean that he can do away with any kind of examination at all. There is no difference between any other Magistrate and a Presidency Magistrate in the case of examining the complainant before the postponement of the issue of process and the ordering of an inquiry u/s 202. (1) Failure by the Presidency Magistrate to observe the mandatory provision of the Code cannot be cured by section 537 Criminal Procedure Code. The non-examination on oath is not an error, commission or irregularity in the complaint. It is a non-observance of a mandatory provision of law, the infraction of which is a disregard of an express provision of law as to the mode of enquiry and as such is not a mere irregularity such as can be remedied by section 537.

8. It may be mentioned that where the mandatory provisions require the Court to follow particular procedure, non-observance will be, as held earlier, complete disregard to the provisions of the Code. In the impugned section a particular procedure is prescribed and if the Court does not follow that procedure, it is incurable illegality and not mere irregularity. For example it has been provided in section 202(2) of the Code that :

"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".

This sub-section (2) of section 202 of the Code has been interpreted in more than one decisions. The view taken by this Court in *Laxmanlal v. J.M.F.C. Kamgaon* 1975 Maharashtra Law Journal, Note No. (17) that any order issuing process in violation of the mandatory provisions without examining the witnesses or the complainant on oath was in violation of the mandatory provisions of section 202(2) proviso and was liable to be quashed. Similarly in *Paranjothi Udyar and Ors. v. The State and Ors.* 1976 Criminal Law Journal 598, the Division Bench of this Madras High Court held that reading of the proviso to Clause (2) of section 202 together with section 208(i) would clearly show that on a complaint before the Magistrate where it appears that the offence committed is triable exclusively by a Court of Session, the statements of all the witnesses produced by the complainant must be recorded and the copies of such statements of all the witnesses so recorded shall be furnished to the accused free of costs. The ratio of these two decisions is to the effect that whenever there is a mandatory provision to follow a particular procedure, it is bounden duty of the Magistrate to follow the said procedure and violation of such will be in complete disregard to the said mandatory provisions.

9. In this case admittedly there is no verification of the complainant and he was not examined at all on oath. To the query by the Court as to why such verification was not brought on record the reply given by the learned Counsel was that it may be misplaced. I have enquired with the learned Counsel as to whether the report should be called for from the trial Magistrate as to whether there was an examination of the complainant on oath or not. The learned Counsel replied that after a period of 7 years the concerned Magistrate may not

be remembering as to whether complainant was examined on oath or not and no purpose would be served by calling the report. The argument that there must have been an examination of the complainant on oath is a mere speculation and conjecture and such a speculation is not permissible. The record shows that there is no examination of the complainant on oath. In view of the above mentioned rulings it is quite clear that non-examination of the complainant on oath and non-signing the same by the complainant as well as the Magistrate are in direct violation and in equal disregard to the mandatory provisions of section 202 of the Code of Criminal Procedure. A presumption should be raised that the Magistrate must have acted according to his duties as per the provisions of section 114(e) of the Evidence Act. Mr. D'Souza has contended that this Court may presume that in the natural course of event the Magistrate may be presumed to have reasonably performed his judicial and official acts and, therefore, it should have been presumed that the Magistrate must have examined the complainant on oath.

10. This submission does not assist take learned Counsel in finding out as to whether there was any verification at all. This Court is, therefore, left with no choice but to hold that on such a complaint it was improper and illegal on the part of the Magistrate to issue any process at all. On this ground alone the complaint is liable to be dismissed and quashed. It is true that this Court has reached this decision after this matter was heard for 3 days on merits. But this conclusion which I have arrived at is inevitable and inescapable.

11. In the result the petition is allowed on a wholly different to than one with which the petitioner-original accused came to this Court.

12. Hence the complaint is dismissed and is quashed. Petition success and is made absolute.