

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 251 OF 2002

Kishor Kakumal Keswani
Age : adult, Occ. Business
R/o. Sector 17, Ulhasnagar,
Dist. Thane.

.. Petitioner

V/s.

1. Miss. Pushpa Mangharam Galani,
Age : adult, Occ. Business

2. Shri. Manohar Mangharam Galani,
Age : adult, Occ. Business
Both R/o 104, Lav-Kush Tower,
Near Civil Court, Ulhasnagar -3,

3. The State of Maharashtra

.. Respondents

WITH

CRIMINAL WRIT PETITION NO. 252 OF 2002

Kamal Sunderdas Bathija
Age : adult, Occ. Business
R/o. Bk. No.1074, O.T. Section,
Ulhasnagar,
Dist. Thane.

.. Petitioner

V/s.

1. Miss. Pushpa Mangharam Galani,
Age : adult, Occ. Business

2. Shri. Manohar Mangharam Galani,
Age : adult, Occ. Business
Both R/o 104, Lav-Kush Tower,
Near Civil Court, Ulhasnagar -3,

3. The State of Maharashtra .. Respondents

WITH

CRIMINAL WRIT PETITION NO. 253 OF 2002

Dunichand Verhomal Makhija
Age : adult, Occ. Business
R/o. Bk. No.713/8, Hospital Area,
Ulhasnagar,
Dist. Thane.

.. Petitioner

V/s.

1. Miss. Pushpa Mangharam Galani,
Age : adult, Occ. Business

2. Shri. Manohar Mangharam Galani,
Age : adult, Occ. Business
Both R/o 104, Lav-Kush Tower,
Near Civil Court, Ulhasnagar -3,

3. The State of Maharashtra .. Respondents

Mr. A.A. Kumbhakoni, Sr. Counsel for the petitioner/s
Mr. Ashok K. Wanwari a/w D.M. Galani for respondent no.2
Mr. Rajesh More, APP for the respondent State

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATE : 4th SEPTEMBER, 2015

JUDGMENT :-

1. The petitioner herein is the complainant in Criminal Case Nos. 422 of 1993, 423 of 1993 and 394 of 1993, pending on the file of learned J.M.F.C., Ulhasnagar. He has initiated proceedings against the respondent no.1 and 2, the accused nos. 1 and 2 in the said cases, for offence under Section 138 of the N.I. Act and Section 420 r/w 34 of the IPC.

2. The respondent no.1 had filed applications dated 18-8-2000 in the respective cases seeking recall of process and to discharge her of the offence u/s 138 of the N.I. Act in accordance with provisions of Section 245 (2) of the Cr.P.C. The learned Magistrate dismissed the said applications vide orders dated 13.10.2000. The said orders were challenged by the respondent no.1 in Criminal Revision Applications Nos.121 of 2000, 123 of 2000 and 122 of 2000, before the learned Addl. Sessions Judge, Kalyan. The learned Addl. Sessions Judge allowed the Revision Applications and set aside the said orders dated 13.10.2000 and consequently recalled the process issued against the

respondent no.1 and discharged her of the offence u/s 138 of the N.I. Act. Aggrieved by the said orders, the petitioner-complainant has filed these petitions.

3. Mr. Kumbhakoni, learned Senior Counsel has submitted that the respondent no.2 herein had filed similar applications before the learned Magistrate way back on 3rd April, 1997. The said applications were disposed of by the learned Magistrate by orders dated 3rd January, 1998, wherein it was held that there are sufficient grounds to proceed against the respondent no.1 for the offence punishable u/s 138 of the N.I. Act. The said findings were confirmed by the learned Addl. Sessions Judge, Kalyan in Criminal Revision Applications filed by the respondent no.2. Criminal Application No.957 of 1999 filed by the respondent no.2 before this Court was dismissed by this Court by order dated 12.01.2000. The learned Counsel for the petitioner submits that the learned Addl. Sessions Judge has totally overlooked these facts and has erred in setting aside the order of the learned Magistrate.

4. Mr. Wanwari, the learned Counsel for respondent no.1 submits that the applications for recall of process was filed by the respondent no.2 and that the respondent no.1 was not a party to the said applications, the Revision Applications filed before the learned Addl. Sessions Judge, Kalyan or the Criminal Application No. 957 of 1999 filed before this Court. Learned Counsel for respondent no.1 therefore contends that there was no legal embargo in filing such application before the learned Magistrate. The learned Counsel for the respondent no.1 further contends that the learned Addl. Sessions Judge has not committed any material irregularity in allowing the revision application.

5. I have given due consideration to the rival submissions advanced by the respective learned Counsels. The records reveal that the petitioner had filed complaints under Section 138 of the N.I. Act alleging that the respondent nos. 1 and 2 had represented to him that they had good knowledge of share market and has induced him to part with huge amount to be invested in the share market. The said amount was received by the respondent nos. 1 and 2 with an

assurance that the same would be returned within two or three months from the date of discounting of shares. The respondent nos. 1 and 2 issued to him post dated cheques with instructions to deposit the same after *Diwali*. The applicant-complainant deposited the said cheques in the bank and the same were returned with an endorsement "account closed". He thereafter approached the respondent nos. 1 and 2 and informed them about the dishonour of cheque. The Applicant Complainant has alleged that he had issued the statutory notice and called upon the Respondent no 1 &2 to pay the cheque amount. The respondents received the said notice but gave evasive reply. The applicant submitted that the said cheques were issued by the accused-respondent no.1 i.e. Pushpa Galani. The applicant-complainant further stated that the amount was received by both the respondents and that both the respondents have misappropriated the same. The applicant complainant further stated that the respondents have closed the accounts with an intention of misappropriating the said amount and cheating him. He, therefore, claimed that the respondents had not only committed offence under

Section 138 of the N.I. Act but has also committed offence under Section 406 and 420 of the IPC.

6. The learned Magistrate had issued process against the respondents for the offence punishable under Sections 420 r/w 34 of the IPC and u/s 138 of the N.I. Act. Apparently, in view of the judgment of the Apex Court in the Case of *K. M. Mathew Vs. State of Kerala, (1992) 1 SCC*, which held the field till the decision in the case of *Adalat Prasad Vs. Rooplal Jinda & Ors. (2004) 7 SCC 338*, the respondent no.2 by application dated 08.01.1977 filed before the learned J.M.F.C., Ulhasnagar, had prayed to discharge him under Section 245(2) of the Cr.P.C.

7. By order dated 03.01.1998, the learned Magistrate held that the mere fact that the cheque was dishonoured is not sufficient to make out a case for the offence under Section 420 of the IPC. The learned Magistrate further observed that though the application was filed only by the respondent no.2 herein, considering the fact that the essential ingredients of Section 420 of the IPC were not made out,

the respondent no.1 was also entitled for discharge of the offence under Section 420 of the IPC. The learned Magistrate further held that there was sufficient material to proceed against the respondents for offence under Section 138 of the N.I. Act. Based on these findings the learned Magistrate discharged the respondents of the offence under Section 420 r/w 34 of the IPC and ordered to proceed against them for offence under Section 138 of the N.I. Act.

8. The said order was challenged in revision applications filed by the applicant-complainant as well as by the respondent no.2. The learned Addl. Sessions Judge held that the complaint *prima facie* discloses the essential ingredients of cheating. The learned Addl. Sessions Judge, therefore, held that the order of discharge of the accused nos. 1 and 2 for the offence under Section 420 of the IPC was not justified either on facts or in law. The learned Addl. Sessions Judge, further held that the cheque was signed only by the accused no.1 and hence, the accused no.2 could not have been prosecuted under Section 138 of the N.I. Act with the aid of Section 34 of the IPC. In the light of the said findings, the learned Addl. Sessions

Judge partly allowed the revision and set aside the order of discharge of the accused under Section 420 of the IPC and directed the learned Magistrate to proceed against both the accused for the offence under Section 420 r/w 34 of the IPC and to proceed against the respondent no.1 for the offence under Section 138 of the N.I. Act.

9. The respondent no.2 herein had challenged the said order before this Court in Criminal Application No.957 of 1999 and the same was dismissed by this Court *vide* order dated 12.01.2000 with observation that the matter requires investigation in evidence which can be determined at the time of trial.

10. The order dated 03.1.1998 had thus attained finality with the order dated 12.1.2000 in Criminal Application No. 957 of 1999. Thereafter, the respondent no.1 filed an application dated 18.08.2000 before the learned Magistrate seeking discharge / recall of process issued under Section 138 of the N.I. Act. The present controversy revolves around the said application and the order passed thereon by the learned Addl. Sessions Judge, Kalyan. The

learned Counsel for the respondent no.1 has tried to justify filing of the application as well as the order of the learned Addl. Sessions Judge, Kalyan on the ground that the respondent no.1 was not a party to the previous proceedings viz. the Application dated 3.4.1997, the Revision Application no.27 of 1998 and the Criminal Application No. 957 of 1999.

11. It is not in dispute that the application dated 3.4.1997 for recall of process was filed by the respondent no.2 and not by the respondent no.1. The order dated 03.01.1998 reveals that the learned Magistrate was conscious of this fact despite which the learned Magistrate had held that no case was made out against the respondent no.1 for offence u/s 420 of the IPC and had, therefore, discharged the respondent no.1. The learned Magistrate had further held that there was sufficient material on record to proceed against both the accused for the offence u/s 138 of the N.I. Act.

12. It is thus, evident that though the respondent no.1 was not a party to the recall application, the learned Magistrate had recalled

the process issued against her under section 420 IPC. Furthermore, the learned Magistrate had rendered an adverse finding that there was sufficient material against the respondent no.1 to proceed under section 138 N.I.Act.

13. This leads to the question whether the respondent no.1, who was not a party to the said application, could have invoked the revisional jurisdiction of the Sessions Court to challenge the said findings. In this regard it is relevant to note that under the revisional jurisdiction under Section 397 (1) of the Cr.P.C. the High Court or any Sessions Judge can call for and examine the record of any proceeding before any inferior Criminal Court situated within its jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings before any inferior Criminal Court. Section 399 of the Cr.P.C. deals with the Sessions Judge's powers of revision. Sub-section (1) of Section 399 of the Cr.P.C. provides that in case of any proceedings the record of which has been called for by himself, the Sessions Judge

may exercise all or any of the powers, which may be exercised by the High Court under Sub-Section (1) of Section 401 of the Cr.P.C.

14. From plain perusal of provisions under Sections 397, 399 and 401 of the Cr.P.C., it is evident that in exercise of the revisional powers, the High Court or a Sessions Judge can call for the records of Criminal proceedings, from any Criminal Court within its local jurisdiction and examine the correctness, legality or propriety of any finding, sentence or order recorded or passed by such Court and as to regularity of any proceedings of such Court. The powers conferred under Section 397 and 401 of the Cr.P.C. are in the nature of supervisory jurisdiction to prevent miscarriage of justice, to correct irregularity of the proceeding and to meet out justice. These powers can be exercised *suo moto* and further as can be seen from Sub-Section (3) of Section 397, can be invoked by 'any person' which would include aggrieved person.

15. In the instant case, as stated earlier, the learned Magistrate had rendered a finding that there was sufficient material to proceed

against the respondent no.1 for the offence u/s 138 of the N.I. Act and had accordingly ordered to proceed against the respondent nos. 1 and 2 for offence u/s 138 of the N.I. Act. The respondent no.1 was aware of the said finding and being aggrieved by the said finding and the order, she was entitled to invoke the revisional jurisdiction of the Sessions Court.

16. It is also pertinent to note that the respondent had challenged the order of the learned Magistrate discharging both the accused i.e. the respondent no. 1 and 2 herein of offence under section 420 of the IPC by filing Revision Applications before the Addl. Sessions Court. Similarly, the respondent no.2 had challenged the order directing him to face the trial for offence u/s 138 of the N.I. Act. Both these Revisions were decided by a common judgment dated 30.09.1998 wherein the learned Addl. Sessions Judge had directed the learned Magistrate to proceed against both the accused i.e. the respondent nos. 1 and 2 herein for offence u/s 420 r/w 34 of the IPC. The Sessions Judge had held that the respondent no.2 could not be charged for offence under Section 138 of the N.I. Act with said of

Section 34 of the IPC. The process issued against respondent no.2 for offence under Section 138 of the N.I. Act was recalled with further orders to proceed against the accused no.1 i.e. the respondent no.1 herein for the offence u/s 138 of the N.I.Act.

17. It is pertinent to note that the respondent no.1 was a party to the said Revision Applications and was well aware of the order passed by the learned Addl. Sessions Judge. The respondent, therefore, had a remedy of approaching the High Court in exercise of powers under Section 482 of the Cr.P.C. The respondent no.1 however, once again chose not to challenge the said order, but waited till the dismissal of the Criminal Application No. 957 of 1999 filed by respondent no.2 before this Court. After the dismissal of the said application, the respondent no.1 has resorted to a second round of litigation by filing the application for recall of process before the learned Magistrate, which application came to be dismissed by the learned Magistrate, which order came to be set aside by the impugned order.

18. It is pertinent to note that the previous order of the learned Addl. Sessions Court was brought to the notice of the Sessions Judge, despite which, the learned Addl. Sessions Judge allowed the Revision Applications and thus, set at naught the order dated 30.09.1998 passed by his predecessor. Needless to state that there is no provision in the Code of Criminal Procedure empowering Magistrate or the Sessions Judge to review or recall an order passed by him or his predecessor. The Subordinate Criminal Courts are also not conferred with inherent powers. In these circumstances, therefore, the learned Addl. Sessions Judge had absolutely no jurisdiction to recall or review the order dated 30.09.1998, whereby the learned Addl. Sessions Judge had ordered to proceed against the respondent no.1 for the offence under Section 138 of the N.I. Act.

19. It is also pertinent to note that the complaint was filed on 27.12.1993 and the process was issued on 29.12.1993. The respondent no.1 had filed the application for recall of process on 18.08.2000 i.e. almost after a period of 7 years. The respondent no.1 has not disclosed any reasons for not raising such challenge at

any prior point of time. The conduct of the Respondent No.1 demonstrates that the object of filing such application was only to delay the proceedings. This is nothing but gross abuse of process of the Court.

20. Under the circumstances, the petitions are allowed. The impugned orders dated 04.09.2001 passed by the Addl. Sessions Judge, Kalyan in Criminal Revision Application Nos.121 of 2000, 123 of 2000 and 122 of 2000 are hereby set aside. The petitioner as well as the respondents are directed to appear before the learned JMFC, Ulhasnagar on 21.09.2015.

21. At this stage, the learned Counsel for the respondents seeks stay of the order for a period of 8 weeks. It is seen that a period of 22 years has already lapsed since the date of filing of the complaint, yet the complaint is still at the initial stage of inquiry before charge. It is well settled that the right of speedy trial in all Criminal prosecutions is an inalienable right under Article 21 of the Constitution. Granting stay as prayed for would infringe the Constitutional right of speedy

trial. Hence, in the facts and circumstances of the case, I am not inclined to stay the operation of the order. Hence, the request rejected.

(ANUJA PRABHUDESSAI, J.)

Certificate

Certified to be true and correct copy of the original signed judgment / order.