

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL REVISION APPLICATION NO. 209 OF 2015

Bharat Vijayraj Pandya

.....Applicant

V/s.

Rajendra Govindji Khona and another

....Respondents

Mr. H. H. Ponda i/b Mr. Mukesh Modi for Applicant

Mr. S. R. Gaud for respondent no. 1

Mr. R. M. Gadhvi APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.

DATED : OCTOBER 20, 2015.

PC :

Heard respective parties.

- 2) Rule. Rule made returnable forthwith with the consent of the parties.
- 3) Applicant herein happens to be original complainant in case no. 78/SW/2014 pending before Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai. Learned Magistrate after recording the verification statement had called for report under section 202 of Code of Criminal Procedure, 1973. It appears from the records that report under section 202 of Code of Criminal Procedure, 1973 indicated that no offence as alleged against accused is made out. Investigating Officer had once again recorded the statement of the complainant, accused

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and two witnesses. After receipt of report under section 202 of Code of Criminal Procedure, 1973, learned Magistrate was of the opinion that complainant had independently made out a case for issuing process and had not accepted the report under section 202 of Code of Criminal Procedure, 1973. On 11/11/2014, learned Magistrate had issued process against accused under section 420, 467, 471 of Indian Penal Code.

4) Being aggrieved by the order of issuance of process, accused therein had filed criminal revision no. 1464 of 2014 before Sessions Court at Greater Bombay. Learned Sessions Court had considered the report under section 202 of Code of Criminal Procedure, 1973. Learned Sessions Court had observed that police report revealed that complainant had sought loan from some other person through some other broker and the relations between respondent no. 1 and the applicant were of the owner and broker. Revisional court had heard the arguments of the complainant and accused. Revisional court had considered the judgments cited by accused/revision applicant in the case of **State of Haryana V/s Bhajanlal** reported in **A.I.R. 1992 S.C.C.**

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5) Revisional Court upon perusal of the complaint was of the opinion that since accused therein i.e. present respondent had initiated proceedings against complainant under section 138 of Negotiable Instruments Act, complainant has initiated criminal proceedings under section 420 of Indian Penal Code against revision applicant. Revisional court had considered the defence of the accused and had allowed the revision application. It was also observed that learned Magistrate had not assigned any reason for not accepting the report under section 202 of Code of Criminal Procedure, 1973 filed by the police and by an order dated 27/02/2015 was pleased to allow revision application and thereby proceedings initiated against respondent were quashed.

6) Learned counsel for the applicant rightly submits that the court cannot be oblivious of the fact that order of issuance of process was challenged by filing a revision application. That learned sessions court has ignored the scope of revision application.

7) Section 397 of Code of Criminal Procedure, 1973 reads thus:

“(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them”.

8) It is a settled law that defence of the accused cannot be considered in a revision application. The Judgment in the case of **State of Haryana V/s Bhajanlal** was a judgment in which the impugned orders were passed under section 482 of Code of Criminal Procedure, 1973. It is not open for the revisional court to consider the defence of the accused, more particularly when the allegation is under section 420 of Indian Penal Code. To determine as to whether an offence of cheating has been committed, what needs to be seen is the intention of the accused, the element of *mens rea* which can only be decided after recording of evidence.

9) Learned counsel for the applicant has placed reliance upon the Judgment of Hon'ble Apex Court in the case of **Nagawwa Vs. Veeranna**

reported in **A.I.R. 1976 Supreme Court 1947** wherein Hon'ble Apex Court has held that defence of the accused cannot be considered in revision application. The Hon'ble Apex Court has observed that:

“It would thus be clear from the two decisions of this Court that the scope of the inquiry under section 202 of the Code of Criminal Procedure is extremely limited—limited only to the ascertainment of the truth or falsehood, of the allegations made in the complaint—(i) on the materials placed before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all advert to any defence that the accused may have. In fact it is well settled that in proceedings under section 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not.”

10) It is true that learned Magistrate has not assigned specific reasons for not accepting report under section 202 of Code of Criminal Procedure, 1973. The powers under section 202 of Code of Criminal Procedure, 1973 are exercised for the purpose of ascertaining as to

whether a case is made out for issuance of process. It is an admitted position that Magistrate is not bound by conclusion drawn by the police officer who has inquired under section 202 of Code of Criminal Procedure, 1973. But then it would incumbent upon learned Magistrate to assign just and sound reasons for not accepting report under section 202 of Code of Criminal Procedure, 1973.

11) Learned counsel for the respondent submits that in fact, criminal proceedings are initiated by the complainant to satisfy his personal vendetta for being prosecuted under section 138 of negotiable instruments act at the behest of the present respondent. However, since the allegations are under section 420 Code of Criminal Procedure, 1973, it would be necessary to see as to whether an offence of cheating has been made out. Learned counsel for the respondent further submits that in other case, it would become open to the accused in an offence under section 138 of Negotiable Instruments Act to raise a preliminary defence by filing a complaint under section 420 of Indian Penal Code. However, all these aspects cannot be considered at this stage. This Court would make it clear that the court seized with proceedings under

section 138 of Negotiable Instruments Act shall not be influenced by the criminal proceedings initiated by the applicant or the order passed thereunder.

ORDER

- (i) Order dated 27/02/2015 passed by City Civil and Sessions Court in revision application no. 1464 of 2014 is hereby quashed and set aside.
- (ii) Matter is remanded to the Court of Additional Chief Metropolitan Magistrate, Esplanade, Mumbai in C.C. No. 78/SW/2014 to consider report under section 202 of Code of Criminal Procedure, 1973 and record a finding for not accepting the report and pass appropriate orders thereupon.
- (iii) In any case, it would be open for the Magistrate to record evidence before charge and arrive at a conclusion as to whether complainant has made out a case for framing the charge under section 420 of Indian Penal Code.
- (iv) Powers of Magistrate are unfettered.
- (v) It is made clear that observations made herein above are

restricted to the complaint filed by the present applicant and shall not be taken into consideration in proceedings under section 138 of Negotiable Instruments Act.

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

(vii) Revision application is disposed of.

(SMT. SADHANA S. JADHAV, J.)