

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 53 OF 2016

MR. ANTHONY RICHARD PEREIRA. ... Petitioner

Versus

MR. RALPH D'SOUZA AND ANR., ... Respondents

Shri R.G. Ramani, Advocate for the Petitioner.

Shri A.F. Diniz with Shri Ryan Da Piedade Menezes,
Advocates for Respondent No. 1.

CORAM:- C.V. BHADANG, J.

DATE:- 27th JUNE, 2016.

ORAL ORDER:

Heard the learned Counsel for the parties.

2. By this petition, the petitioner/accused is challenging the order dated 06.03.2013 (below Exhibits D-89 and D-96) passed by the learned Judicial Magistrate First Class, Mapusa in Criminal Case No. 221/P/2004/C, by which the application filed by the petitioner for dismissal of the complaint and for discharge under Section

245(2) of the Code of Criminal Procedure, 1973 (the Code, for short) has been rejected.

3. The brief facts are that the respondent no. 1 has filed the aforesaid complaint against the petitioner, with the allegations that the petitioner has intentionally indulged into acts, which has led the respondent no. 1 to incur business loss to the tune of Rs.65 lakhs.

4. It appears that the learned Magistrate recorded the verification of the complainant (PW-1) Mr. Ralph D'Souza (Exhibit-4). The record shows that this was partly recorded on 03.11.2004 and thereafter on 07.01.2005. The learned Magistrate by an order dated 09.06.2005 issued process against the petitioner for the offence punishable under Section 418 IPC read with Section 420 of IPC. The petitioner appeared before the learned Magistrate and sought his discharge on more than one occasion, one of such order had led to filing of Criminal Writ Petition No. 30/2012

before this Court, which was dismissed on 19.07.2012. A copy of the said order reveals that the petitioner had earlier filed two applications for discharge and this Court found that it was not a fit case for exercise of jurisdiction under Section 482 of the Code. The objection raised at that stage was to the territorial jurisdiction of the learned Magistrate, in view of Section 188 of the Code, which was left open.

5. Be that as it may, the petitioner thereafter filed yet another application for dismissal of the complaint on the ground that the verification recorded was irregular, as the complainant (PW-1) was led by Advocate P.R. Prabhu. In short, the contention is that the recording of the verification is essentially between the complainant and the Court. As such, verification should be recorded by the Court without intervention of the learned Counsel for the complainant or anybody else.

Reliance is placed on the decision of this Court in the case of **Mr. Shailesh H. Bajaj Vs. Sesa Goa Limited** in Criminal Writ Petition No. 6/2005 decided on 27.04.2006.

6. The learned Magistrate, by the impugned order, has dismissed the application, refusing to discharge the petitioner. This was challenged before the learned Sessions Judge in Criminal Revision Application No. 39/2013. The learned Sessions Judge by the judgment and order dated 02.01.2016 has dismissed the criminal revision *inter-alia* on the ground that the petitioner had not pointed out the irregularity "at the earliest opportunity". The learned Sessions Judge noticed that the order issuing process was passed on 09.06.2005 and the petitioner had put in appearance on 19.07.2005. However, the application claiming the verification being defective was filed only on 30.07.2012. Feeling aggrieved, the petitioner is before this Court.

7. I have heard Shri Ramani, the learned Counsel for the petitioner and Shri Diniz, the learned Counsel appearing for respondent no. 1.

8. It is submitted by Shri Ramani, the learned Counsel for the petitioner that the learned Sessions Judge was in error in placing reliance on the Full Bench decision of this Court in the case of **Rajiv Banga Vs. L and T Finance Co. Ltd., 2011 Cri.L.J. 1806.** It is submitted that the said decision arose out of the proceedings under Section 138 of the Negotiable Instruments Act and as such, the ratio therein could not have been applied to the case, arising out of an offence under the Indian Penal Code. It is submitted that this Court in the case of **Mr. Shailesh H. Bajaj** (supra) has held that non compliance with Section 200 of the Code would result into causing prejudice to the accused. In short, it is contended that it is not necessary for the accused in such case, to independently demonstrate that there is prejudice caused. He

therefore, submits that the complaint is liable to be dismissed.

9. On the contrary, Shri Diniz, the learned Counsel for respondent no. 1 has supported the impugned order. It is submitted that unless and until, the accused demonstrates prejudice, this Court may not interfere with the concurrent findings recorded by the Courts below, refusing to dismiss the complaint. The learned Counsel submits that the petitioner has repeatedly filed applications seeking his discharge and/or dismissal of the complaint on various grounds and having regard to the fact that the present application was belated, has rightly not been acted upon.

10. I have considered the rival circumstances and the submissions made. Indeed the verification of PW-1, Ralph D'Souza shows that he was represented (or led) by Advocate P.R. Prabhu. The question is, whether for this reason alone, the

complaint can be dismissed under Section 245 of the Code at this stage. Undisputedly, the cases before the learned Magistrate is triable as a warrant case and it would be governed by the provisions of Section 238 to Section 250 of the Code. Section 244 of the Code envisages recording of evidence before charge. Section 245(1) of the Code provides that if, upon taking such evidence referred to in Section 244, the Magistrate considers, for the reasons to be recorded, that no case against the accused has been made out, which if, unrebutted, would warrant his conviction, the Magistrate shall discharge him. Sub-Section 2 of Section 245 of the code provides that nothing in this Section shall be deemed to prevent the Magistrate, from discharging the accused at any previous stage of the case if, for reasons to be recorded, he considers the charge to be groundless. It can thus be seen that Section 245(2) of the Code is an enabling provision under which, the Magistrate may not wait till the evidence, as produced by the complainant under

Section 244 of the Code is recorded, and where the Magistrate considers the charge to be groundless. In that event, nothing prevents the Magistrate to discharge the accused at any previous stage of the case. Thus, the sine qua non for the exercise of powers under Section 245(2) of the Code, is that the Magistrate has to find that the charge is groundless. Now can it be said that merely because recording of the verification is irregular, the charge is groundless, and in my considered view, the answer has to be in the negative.

11. On behalf of the petitioner, strong reliance is placed on the decision of this Court in the case of **Mr. Shailesh H. Bajaj** (supra), in which it is held thus:

"There is no doubt that although Section 200 of the Code is couched in a mandatory form, nevertheless it is directory in nature being a procedural provision and to that extent non compliance of the same has got to be considered as a gross irregularity which is curable but there is no reason why such an

irregularity cannot be corrected in cases where prejudice has been caused to the accused the the accused complains about the same at the earliest opportunity. Such a view would be in tune with Section 465 of the Code"

12. It can thus be seen that even in the said case, it has been held that although, Section 200 has been couched in a mandatory form, nevertheless it is directory in nature being a procedural provision. It has been further held that the irregularity can be considered as curable and cannot be corrected in cases where prejudice has been caused to the accused, and where the accused complains about the same "at the earliest opportunity". It has been held that such a view would be in tune with Section 465 of the Code. It can thus be seen that one of the reasons, in that case was that the accused had acted promptly. In the present case, as noticed earlier, the petitioner has put in appearance in the complaint on 19.07.2005, however the application to dismiss the complaint was filed only on 30.07.2012. Shri

Ramani, the learned Counsel in this regard submitted that charge is not framed in the case and the complaint, is still at the stage of recording evidence before charge. In my considered view, this may not be decisive as in such cases, the accused has to act with promptitude and point out the irregularity, if any. I find that as the accused has not approached the Court at the earliest, it is not possible to entertain the challenge. It would however be open to the petitioner to demonstrate any prejudice resulting, on account of irregularity in the manner of recording the verification, if any, when the Magistrate, takes up the case for deciding whether charge is to be framed or not.

With this, the petition is dismissed.

C.V. BHADANG, J.

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