

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.942 OF 2018

Mahendra Jamnadas Kara]
"Target – the Mall"]
Bhimji Kara Wadi, Chadavarkar Road]
Opp Raj Mahal Hotel]
Borivalli (W), Mumbai – 400092]..... Applicant

Versus

1] Mukesh Baburao Waghmare]
Flat No.204, E Buldg.]
Windsor Country,]
Ambegaon (BK), Katraj]
Pune 411046]
2] State of Maharashtra]
(through Learned Public Prosecutor,]
High Court, Mumbai)].... Respondents.

Mr. Harshad E Palwe for the Applicant.
Mr. Priyal G Sarda for Respondent No.1.
Mrs. Rutuja Ambekar, AGP for the Respondent/State.

CORAM : S. S. SHINDE, J
DATE : 26th August 2019

ORAL JUDGMENT :

1 Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard.

2 Heard the learned counsel for the parties. The learned counsel appearing for the Applicant invites attention of this Court to the averments

made in the complaint as also to the verification statement of the complainant and other documents placed on record, and submits that the learned Magistrate has rightly issued process keeping in view the averments of the complaint as also the verification statement of the complainant. It is submitted that without assigning any reasons, why the order of issuance of process is not correct, the Sessions court by a cryptic order set aside the order of issuance of process passed by the learned Magistrate. The learned counsel for the Applicant relying upon the judgment of the Apex Court in the case of **Kamal Shivaji Pokarnekhar v/s. State of Maharashtra and ors.**¹ submits that the Apex Court in the facts of that case ruled that, if ingredients of offence alleged against accused are prima facie made out in complaint, criminal proceeding shall not be interdicted. He submits that in the present case the averments in the complaint and the verification statement of the complainant clearly disclose the ingredients of alleged offences and therefore the learned Magistrate has rightly issued the process, and therefore, there was no reason for the Sessions court to cause interference in the well reasoned order passed by the learned Magistrate.

2 On the other hand, the learned counsel appearing for the contesting Respondent invites attention of this Court to the averments made in the complaint and submits that, none of the averments would disclose the alleged offences. He submits that there are two reports submitted by the police

¹ 2019(2) Bom. C.R.(Cri) 626

under Section 202 of the Criminal Procedure Code taking a view that the dispute is of civil nature, and therefore, the Sessions Court has rightly caused interference in the order of issuance of process passed by the learned Magistrate. He submits that there was an agreement between the parties, and in case of breach of terms of the said agreement, the complainant is at liberty to avail of a civil remedy. It is submitted that the Applicant has already filed a civil suit for the breach of contract. He invites attention of this Court to the verification statement of the complaint and submits that, even if the said statement is read in its entirety, no offence as alleged against the accused is disclosed. He also invites attention of this Court to the judgment of the Sessions court and submits that the Sessions Court, has assigned sufficient reasons and thereafter set aside the order of issuance of process passed by the learned Magistrate. It is submitted that if there is an agreement and in case of breach of the said agreement, it is always open for the party to avail of a civil remedy. The learned counsel for the contesting Respondent invites attention of this Court to the judgment of the Apex Court in the case of **Vinod Natesan v/s. State of Kerala & ors²**. and submits that in case of breach of agreement, proper remedy is to file civil proceeding in the civil court as held by the Apex Court in the facts of the said case.

3 Heard the learned counsel for the parties at length. With their able assistance perused the averments made in the complaint, the verification

² 2018 0 Supreme (SC) 1244.

statement of the complainant, the annexures of the Criminal Application as also the reasons assigned by the court below. From reading of the averments in the complaint in paragraphs 5, 7, 14, 15, 17, 19, 20, 24, 28, 29 and 36, it is clear that prima facie ingredients of the alleged offences get attracted, and consequently alleged offences are disclosed. The Sessions Court in the impugned judgment and order did not advert to the averments made in the complaint, and without adverting to the averments made in the complaint as also the verification statement of the complainant, proceeded to pass the impugned order thereby quashing and setting aside the order of issuance of process passed by the learned Magistrate.

4 The learned counsel for the Applicant is right in placing the reliance on the judgment of the Apex Court in the case of ***Kamal Shivaji Pokarnekar*** (supra) and observations made in paragraph 5 thereof.

5 In that view of the matter and keeping in view the averments made in the complaint as also the verification statement of the complainant, and the reasons assigned by the learned Magistrate for issuance of process, this Court is of the opinion that the order dated 02/04/2018 passed by the Sessions Court in Criminal Revision Application No.361 of 2017 deserves to be quashed and set aside, and is accordingly quashed and set aside. The order dated 30/10/2017 passed by the learned Magistrate issuing process is restored and

proceedings i.e. C.C. No.379/SW/2015 are restored to the file of the learned Metropolitan Magistrate, 26th Court, Borivali. The Criminal Application is accordingly allowed. Rule is accordingly made absolute to the aforesaid extent.

[S. S. SHINDE , J]