

GRM

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

CRIMINAL APPLICATION NO. 1429 OF 2018

Bharat Kantilal Dalal ... Applicant

V/s.

The State of Maharashtra & Anr. ... Respondents

Mr. Karanshingh Rajput, Hormuz Mehta i/b J. Sagar Associates,
Adv. for the Applicant.

Ms. Anamika Malhotra, APP for the State/Respondent.

Mr. Haresh Jagtiani, Sr. Adv. a/w Mr. Yashpal Jain, Vandana Mehta
i/b Haresh Jagtiani and Associates, Adv. for Respondent no. 2.

CORAM : R. G. AVACHAT, J.

DATED : JANUARY 31, 2023

P.C. :

Heard.

2. The challenge in this application, under Section 482 of the Code of Criminal Procedure, 1973 (for short "**Cr.P.C.**"), is to the order dated 16/10/2015 passed by the Court of Additional Chief Metropolitan Magistrate, 38th Court at Ballard Pier, Mumbai in C.C. No. 181/SW/2015 filed against the applicant and others for the offence punishable under Sections 405 & 409 read with Section 109 & 120-B of the Indian Penal Code, 1860 (for short "**IPC**") and the order dated 31/10/2018 passed by the Court of Additional Sessions Judge, Greater Mumbai in Criminal Revision Application No. 538/2016.

3. Learned Additional Chief Metropolitan Magistrate (for short

“**Magistrate**”) vide order dated 16/10/2015 issued process for the offence punishable under Section 409 read with Section 34 of IPC. The said order was challenged in revision by the applicant herein. He has however been unsuccessful therein. He is therefore before this Court.

4. Learned Advocate for the applicant (original accused no. 1) would submit that the learned Magistrate erred in accepting the verification statement, which was not submitted in accordance with the rules and the procedure prescribed under law. According to him, recording of verification statement is not a mere formality. Learned Magistrate is required to record the same in verbatim, as stated by the complainant in open Court. In the case in hand, the complainant produced a ready-made verification statement and submitted the same to the Court. The title thereof would itself indicate that it was not recorded before the Court. The verification statement was not on oath. Moreover, during hearing of the revision application, learned Counsel for respondent no. 2 submitted that though the verification statement was prepared outside, no prejudice was caused to the applicant herein.

a. According to learned Advocate, the contents of alleged verification statement have been copied and pasted from the complaint itself. The contents of verification statement are more or less in verbatim and identical to the affidavit in support of the complaint. The same is contrary to the procedure laid down under Section 200 of Cr.P.C. Learned Magistrate ought not to have accepted the same. Learned Magistrate has failed to discharge his

duty under the Code. The object of Section 200 of Cr.P.C., is to find out whether there are sufficient grounds for proceeding against the accused and to prevent issue of process on complaints, which are false or vexatious or intended to harass the persons arrayed as accused.

b. According to learned Advocate, the original complainant passed away. It being a case instituted otherwise on police report and requiring a procedure for warrant trial case. Respondent no. 2, who has been brought on record as legal representative of the deceased complainant, may file his verification statement before learned Magistrate on remand of the matter before the said Court. He would further submit that although the co-accused had taken exception to the order of issuance of process by filing revision application, wherein the present applicant was one of the respondents, the grounds of challenge therein, were not in relation to the non-recording of verification of the original complainant.

c. According to learned Advocate, the decision in revision application preferred by the co-accused, would therefore not come in his way. Learned Advocate also took exception to the observations made by learned Additional Sessions Judge in dismissing the applicant's revision application.

d. Learned Advocate in support of his contentions, has relied on the following authorities :-

- **Associated Cement Co. Ltd. vs. Keshvanand** reported in (1998)1 Supreme Court Cases 687;

- **Rajesh Gulab Patil vs. Shankar Rama Parad and Another** reported in 2019 SCC OnLine Bom 10768;
- **M/s. Nova Electricals, Jalgaon vs. State of Maharashtra & Anr.** reported in 2006 SCC OnLine Bom 1310;
- **S. R. Sukumar vs. S. Sunaad Raghuram** reported in (2015)9 Supreme Court Cases 609;
- **Sri K. Venkataramaiah and Others vs. Sri Katterao** reported in ILR 2008 KAR 474;
- **Madhao and Another vs. State of Maharashtra and Another** reported in (2013)5 Supreme Court Cases 615;
- **Naganagouda Veeranagouda Patil and Another vs. Malatesh H. Kulkarni and Others** reported in ILR 1997 KAR 2091;
- **Prakash Vasant Kuray vs. The State of Maharashtra and Another** reported in Criminal Writ Petition No. 635 of 2022 decided on 19/07/2022 and
- **State of Punjab vs. Davinder Pal Singh Bhullar and Others** reported in (2011)14 Supreme Court Cases 770.

5. Learned Counsel for respondent no. 2 would on the other hand submit that in view of Section 114 (e) of Indian Evidence Act, 1872, there is a presumption that all judicial and official acts have been regularly performed.

a. Learned Counsel has relied on the judgment of Karnataka High Court (Dharwad Bench) in the case of **Narayan vs. Sadanand**

and Others reported in **MANU/KA/2127/2017** and the order passed by the Hon'ble Apex Court on 15/12/2017 in Petitions for Special Leave to Appeal Criminal No. 9677/2017, wherein the following order is passed :-

“ORDER

Heard. We do not find any ground to interfere with the impugned order.

However, we direct that the petitioner may be granted exemption from personal appearance and be allowed to appear through counsel on an application being filed before the Trial Court, subject to such conditions as the Trial Court may impose. The special leave petition is accordingly disposed of. Pending applications, if any, shall also stand disposed of.”

6. Considered the submissions advanced. Perused the complaint and the orders impugned herein.

7. The complainant (since deceased) was 83 years of age, when he lodged the complaint in the year 2015. The applicant herein was a nephew of the complainant. The co-accused in the case are the sons of applicant. It has been alleged in the complaint that a company viz. D. M. Commodities Private Limited (accused no. 4 in the complaint) was formed by the applicant and the co-accused. There were three more entities viz. Star Grain and Shipping Pvt. Ltd., Star Grain and Shipping and Company and Kantilal and Company (Bombay). Since the complainant's ouster in June 2007, the applicant and the co-accused sidelined him from the affairs of all these entities. Most of the funds in bank accounts of all these entities were siphoned off by the applicant and co-accused by

transferring them to their personal accounts.

8. This Court is not much concerned about the allegations in the complaint. Suffice it to say that it was the case of complainant that the applicant and his two sons misappropriated the funds of business run by all of them together.

9. It is reiterated that the complainant (deceased) was little over 83 years of age while the complaint was lodged. The extract of bank accounts were produced along with the complaint in support of the allegations therein.

10. The order impugned herein passed by learned Additional Sessions Judge reads thus :-

“17. Now, let us see whether the statement placed on record can be said to be in accordance with the provisions incorporated under Section 200 of the Code. It is true that on perusal of the statement which has been posed to be the verified statement of the complainant under Section 200 of the Code, it is found that it is nothing to reproduction of the complaint except few changes. In this regard learned Advocate for the complainant has submitted that the presumption under illustration (e) to Section 114 of the Evidence Act, is that judicial and official acts have been performed and therefore according to him, in absence of rebuttal, the presumption can be pressed into service. In my view, the mere fact that the verified statement contains some terms which are also found in the complaint cannot be said to be sufficient to rebut the presumption under Section 114(e) of the Evidence Act. In view of the presumption incorporated under Section 114 of the Evidence Act, this Court has to presume that the judicial act performed by the Judicial Officer has been performed by him in due course.

18. At this juncture, it would be necessary to make

reference to the strange statement made by the learned Advocate for the complainant. He has submitted before this Court that even if the complainant has placed on record the typed statement and the learned Magistrate had taken his signature on the same, that can be said to be permissible under Section 200 of the Code. If the statement made by the learned Advocate for the complainant is accepted, in that case, it would negate the very object to enact the provisions under Section 200 of the Code and it will be contrary to the law laid down by the Hon'ble Apex Court and the High Court in the above cited cases. This Court is well aware that there is large pendency of the cases before the learned Magistrate, but that cannot be said to be a ground to flout the provisions which are incorporated under Section 200 of the Code. Hence, I do not accede with the submissions of the learned Advocate for complainant that there is no wrong to place on record the Written Statement in lieu of the verification prescribed under Section 200 of the Code."

11. Exhibit-L, page no. 443 is stated to be verification on oath on behalf of the complainant. The last page thereof bears signature of the complainant, the judicial clerk and learned Additional Chief Metropolitan Magistrate. It is true that the verification statement is typed-written. It runs into seven pages, whereas the complaint runs into not less than 30 pages. The verification statement contents gist of the complaint. Learned Magistrate went through the complaint, verification statement and entries in the bank accounts indicating transfer of amounts. As such, the record *prima-facie* suggest that learned Magistrate has applied his mind before issuance of process.

12. There can be no two views over what has been observed by the Hon'ble Apex Court and this court in the authorities relied on by the learned Advocate for applicant. The gist thereof is

reproduced hereinbelow, which has been observed in the case of **Associated Cement Co. Ltd. vs. Keshvanand** (*supra*) :-

“Chapter XV of the new Code contains provisions for lodging complaints with magistrates. Section 200 as the starting provision of that chapter enjoins on the magistrate, who takes cognizance of an offence on a complaint, to examine the complainant on oath. Such examination is mandatory as can be discerned from the words “shall examine on oath the complainant.....”. The magistrate is further required to reduce the substance of such examination to writing and it “shall be signed by the complainant”. Under Section 203, the magistrate is to dismiss the complaint if he is of opinion that there is no sufficient ground for proceeding after considering the said statement on oath. Such examination of the complainant on oath can be dispensed with only under two situations, one if the complaint was filed by a public servant, acting or purporting to act in the discharge of his official duties and the other when a court has made the complaint. Except under the above understandable situations the complainant has to make his physical presence for being examined by the magistrate. Section 256 or Section 249 of the new Code clothes the magistrate with jurisdiction to dismiss the complaint when the complainant is absent, which means his physical absence.”

13. The issue involved in the aforesaid case was not as to non-recording of verification statement. It was a case wherein on account of non-appearance of the complainant before the Court concerned, the accused therein was acquitted. The complainant therein was a corporate entity.

14. In the case of **Rajesh Gulab Patil vs. Shankar Rama Parad and Another** (*supra*), it has been observed that,

“In **Nova Electricals** (*supra*), this Court in paragraphs 5

and 6 has observed as under :-

5. It is not in dispute that the act of verification is to be performed by the Court. The complainant cannot be penalized for omission to record verification by the Court. It is also not in dispute that the parameters for quashing of the entire proceeding are quite different, in as much as for quashing of proceeding, it has to be established that either there is no cause of action or the proceeding would amount to an abuse of process of Court. This is not the case here. In this view of the matter, prayer is rightly restricted only to the legality of the impugned order of issuing process passed on 20th November, 2002. Time and again, provisions of Section 200 of the Criminal Procedure Code, has been interpreted by this Court. Section 200 itself makes it clear that verification is mandatory. It would be appropriate to reproduce relevant portion of Section 200, Cr.P.C. at this juncture:

200: 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 that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses -

(a) and (b).....

6. Recording of verification is not a mere formality. By recording verification, the Magistrate has to ascertain whether the complaint is genuine or frivolous. The object of verification is to discourage frivolous proceeding. The Magistrate has to apply his mind to the facts of the case and to decide whether all formalities are completed and whether grounds to proceed with the matter for redressal of genuine grievance exist. This aspect has been dealt with by the Apex Court in the matter of **S.W. Palnitkar vs. State of Bihar** reported in (2002)1 SCC 241 : AIR 2001

SC 2960. The Apex Court has observed in para no. 15 as under :

15. In case of a complaint under Section 200, Cr.P.C. or I.P.C. a Magistrate can take cognizance of the offence made out and then has to examine the complainant and his witnesses, if any, to ascertain whether a *prima-facie* case is made out against the accused to issue process so that the issue of process is prevented on a complaint which is either false or vexatious or intended only to harass. Such examination is provided in order to find out whether there is or not sufficient ground for proceeding.....”

In the aforesaid case, there was no verification statement at all.

15. In the case of **S. R. Sukumar vs. S. Sunaad Raghuram** (*supra*), it has been observed that,

“Held, “taking cognizance of an offence” means applying judicial mind to contents of complaint and materials filed therewith and taking judicial notice of an offence – Magistrate takes cognizance of an offence when he decides to proceed against the person accused of having committed that offence and not at the time when he is just informed by filing complaint or police report about commission of that offence – Thus, mere presentation of complaint and receipt of same in Court does not mean that Magistrate has taken cognizance of offence.

Magistrate is not bound to take cognizance where complaint does not disclose any cause of action – Under Section 200 Cr.P.C., for taking cognizance of an offence, Court must examine complainant upon oath to find out whether complaint is justifiable or vexatious – It is only upon examination of complainant the Magistrate would proceed to apply judicial mind whether to take cognizance of offence or not.

But then, mere examination of complainant does not mean that Magistrate has taken cognizance of offence – On examination of complainant, Magistrate cannot be said to have *ipso facto* taken the cognizance when he is merely gathering material to decide whether a *prima-facie* case is made out for taking cognizance or not.

However, it is neither practicable nor desirable to define as to what is meant by taking cognizance – Question as to whether Magistrate has taken cognizance of offence or not would depend upon facts and circumstances of given case.”

16. In the case of **State of Punjab vs. Davinder Pal Singh Bhullar and Others** (*supra*), it has been observed that,

“In *Badrinath vs. Govt. of T.N. and State of Kerala vs. Puthenkavu N.S.S. Karayogam* this Court observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically and this principle is applicable to judicial, quasi-judicial and administrative proceedings equally.”

17. Learned Advocate for the applicant relied on the aforesaid authorities to submit that where there was no verification of the complaint, the subsequent order of issuance of process must fall for want of foundation in the nature of verification of the complaint. He would further meant to say that since there was non-compliance of Section 200 of Cr.P.C., the order of issuance of process was bad-in-law and therefore, needs to be set aside.

18. As stated hereinabove, learned Magistrate went through the complaint. It is not the case of no verification at all. Exhibit-L is the verification on oath of the original complainant. It bears signatures of original complainant, the Court Clerk and learned

Magistrate as well.

19. The original complainant passed away pending the revision application. He is not survived by Class-I heir. He is said to have executed a Will. He allegedly disinherited the applicant and/or his sons. Respondent no. 2 is said to be Class-II heir of the deceased. He was brought on record as Legal Representative of the original complainant. The submission made on his behalf before the Court of Additional Sessions Judge that no prejudice would cause by placing on record a typed-written verification statement, would be of no avail to the applicant herein since it has to be taken that respondent no. 2 was not in know of the proceedings before learned Magistrate. When the complaint was filed, the verification statement was recorded and then the process was issued.

20. This is an application under Section 482 of Cr.P.C. This Court finds no abuse of process of Court has occurred in the order of issuance of process. There is no case to exercise inherent powers to secure the ends of justice. Over seven years have passed post issuance of order impugned herein. The material on record *prima-facie* made out a case for issuance of process. The matter needs to be taken to its logical conclusion.

21. For all these reasons, this Court finds no reason to exercise its jurisdiction under Section 482 of Cr.P.C. The application therefore fails. The same is thus dismissed and disposed of accordingly.

(R. G. AVACHAT, J.)