Case No. 34

2004 (5) CTC 50

IN THE HIGH COURT OF MADRAS

C. Nagappan, J.

27.9.2004 Criminal Revision Case Nos. 1475 & 1476 of 2003

27-09-2004

G. Chandrasekaran Petitioner

Vs

C.R. Umapathy Respondent

Complaint under Section 138 of the Negotiable Instruments Act - proceedings summary in nature - once process issued cannot be recalled - petition for discharge not maintainable - Adalat Prasad Vs. Rooplal Jindat (2004 (4) CTC 698) - followed - in view of the overruling of K M Mathew Vs. State of Kerala (1992 1 S C C 217)..

CASES REFERRED

K.M. Mathew v. State of Kerala & Anr., 1992 (1) SCC 217 ..... (Para 12); Adalat Prasad v. Rooplal Jindal & Others., 2004 (4) CTC 698 : 2004 (7) Scale 137 : JT 2004 (7) SC 243 ..... (Para 13).

Mr. Ramesh, for M/s. Ram & Ram, Advocates for Petitioner.

Mr. G.R. Swaminathan, for Mr. R. Hariharan, Advocates for Respondent

CRL. R.C. ALLOWED

ORDER

1. The Petitioner in both the revision cases is one and same person and similarly, the respondent in both the case is also the same person

2. The petitioner filed two complaints under Section 138 of Negotiable Instruments Act against the respondent herein and both the complaints were taken on file in STR.Nos.9689/1999 and 9688/1999 by the Judicial Magistrate No.II, Pondicherry.

3. The respondent/accused field two petitions in Crl.M.P.No.423/2003 and Crl.M.P.No.422/2003 respectively under Section 245 and 203 of Code of Criminal Procedure seeking for discharge and they were opposed by filing counter. The learned

Judicial Magistrate No.II, Ponidcherry, by common order, dated 7.8.2003, allowed the petitions and discharged the respondent herein of the offence under Section 138 of Negotiable Instruments Act in terms of Section 245, Cr.P.C. Challenging that order, the co mplainant has preferred these revision.

4. The learned counsel for the petitioner contends that the petitions for discharge, purportedly, filed under Section 245 and 203, Cr.P.C are *prima face not* maintainable under law and the trail Court has grossly erred in discharging the accused by looking into the documents which have not been tendered in evidence and proved in a manner known to law.

*5. Per contra,* the learned counsel for the respondent contends that the order of discharge has been made on the basis of documents produced by the respondent/ accused.

6. The offence under Section 138 of Negotiable Instruments Act is punishable with imprisonment, which may extend to two years or with fine or with both and it is a summons, case. The petitions seeking for discharge of the accused were filed under Section 245 and 203, Cr.P.C. Chapter XIX of Code of Criminal Procedure deals with trail of warrant cases by Magistrates and Section 238 to 243, Cr.P.C. relate to cases instituted on a police report and Section 244 to 247, relate to cases instituted otherwise then on police report.

7. Section 245, Cr.P.C. provides for discharge of the accused if no case against the accused has been made out upon taking all the evidence for prosecution in a warrant case otherwise than on a police report. The said provision is not applicable to a case relating to an offence under Section 138 of Negotiable Instruments Act, since it is summons case and the petitions for discharge, field in the present case, under Section 245, Cr.P.C. are not maintainable.

8. The power under Section 203, Cr.P.C. has also been invoked in the discharge petition. During initiation of proceedings, the Magistrate can take cognizance of offences in any one of the three modes mentioned under Section 190(1), Cr.P.C., namely, (a) upon receiving a complaint of facts (b) upon a police report of such facts and (c) upon information received from any other person or upon his own knowledge that such offence has been committed. "Complaint" is defined under Section 2(d) as allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code and "police report" is defined under Section 2 as a report forwarded

by a police officer to a Magistrate under sub-section (2) of Section 173, Cr.P.C. The complaint of facts referred to in Section 190 (1)(a) Cr.P.C. is dealt with in Chapter XV under Section 200 to 203, Cr.P.C.

9. Section 200, Cr.P.C. contemplates examination of complainant and the witnesses by the Magistrate while taking cognizance of an offence on complaint and Section 203, Cr.P.C. contemplates postponement of issue of process against the accused if the Magistrate thinks it fit to inquire into the case by himself or direct an investigation to be made by a police officer for the purpose of deciding whether or not there is sufficient ground for proceeding and after such investigation or inquiry, if the Magistrate finds no sufficient ground for proceeding, he can dismiss the complaint by recording the reason under Section 203 of the Code.

10. If there is sufficient ground for proceeding, the Magistrate shall take cognizance of offence in any one of the three modes referred to supra and he shall issue process by way of summons under Section 204 of the Code if it is a summons case or shall issue a warrant if it is a warrant case and in none of the above stages, the accused is heard. To put it in other words, in whatever mode the cognizance of offence is taken by the Magistrate, the process can be issued only under Section 204 of the Code.

11. Chapter XX of Cr.P.C. deals with trail of summon case by the Magistrate under Section 251 of 259, Cr.P.C. and it is relevant to note that no provision to discharge the accused is provided. Only under Section 258 Cr.P.C, the power to stop proceeding in certain case is provided and that is limited to summons case instituted otherwise than upon complaint, that is, the cases mentioned in Section 190(1)(b) and (c),in which, cognizance is taken upon a police report or upon other information or own knowledge of the Magistrate, Hence, the power under Section 258, Cr.P.C. cannot be invoked in any summons case instituted on a complaint of facts, which is stipulated in Section 190(1)(a), Cr.P.C. The proceeding under Section 138 of Negotiable Instruments, Act, being a summons case, instituted on a complaint, cannot be stopped by invoking the power under Section 258, Cr.P.C. In short, there is no provision providing for discharge of the accused in a summons-case and there is no power to stop proceeding invoking the power under Section 258 of the Code.

12. The Supreme Court, in the Judgment in the case of *K.M.Mathew v. State of Kerala & Anr.,* 1992 (1) SCC 217, held that no specific provision is required for Magistrate to drop the proceedings or rescind the process in a summons case and

process already issued is no bar to drop the proceedings, if the complaint on the very face of it does not disclose any offence against the accused. In other words, in the above decision, it was held that after issuance of summons under Section 204 of Code it was open to the Magistrate at the instance of summoned accused to reconsider his decision of issuing under Section 204 and the summons erroneously issued can be re-called by the Magistrate, for which no specific provision is required

13. The learned counsel for petitioner brings to the notice of the Court the very latest decision of the Supreme Court in the case in ***Adalat Prasad v. Rooplal Jindal & Others.,*** 2004 (4) CTC 698 : 2004 (7) Scale 137 : JT 2004 (7) SC 243, in which, a Bench consisting of three learned Judges of the Apex Court has held that the view in *Mathew's case* does not lay down the correct law. The reasoning of Their Lordships in the above decision is extracted below.

> "15. But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under Section 204 of the Code. Therefore what is necessary or a condition precedent for issuing process under Section 204 is the satisfaction of Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under Section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under Section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in *Mathew's case* before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Section 203 of the Code at which stage the accused had no role to play therefore the question of the accused on receipt of summons approaching the Court and making an application for dismissal of the complaint under Section 203 of the Code for a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.
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> 16. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of Section 200 & 202, the order of the Magistrate may be vitiated, but then, the relief an aggrieved accused can obtain at

that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code dose not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate Criminal Courts, the remedy lies in invoking Section 482 of Code.

17. Therfore, in our opinion, the observation of this Court in the *Mathew's case* (supra) that for recalling an order of issuance of process erroneously, no specific provison of law is required would run counter to the scheme of the Code which has not provided for review and prohibits interference at interlocutory stages. Therefore, we are of the opinion, that the view of the Court in *Mathew's case* (supra) that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, dose not lay down correct law." (Emphasis supplied)

14. In view of the above decision, making an application for dismissal of the complaint under Section 203 of the Code, for reconsideration of the material available on record is impermissible and hence the present petitions seeking for dismissal of the complaint under Section 203 of the Code are not maintainable in law.

15. It is brought to the notice of the Court that the learned Judicial Magistrate in some districts take complaints filed under Section 138 of Negotiable Instruments Act as Calendar Cases while some others take them on file as Summary Trail Cases. In this context, Negotiable Instruments Amendment Act, 2002 has to be taken note of and followed in letter and spirit. Section 143 which has been inserted by the Amendment Act of 2002, stipulates that notwithstanding anything contained in the Code of Criminal Procedure, all offences contained under Chapter XVII of Negotiable Instruments Act dealing with dishonor of cheques for insufficiency etc, of funds in the accounts, shall be tried by a Judicial Magistrate and the provision of Sections 262 Cr.P.C. prescribing procedure for summary trails and it shall be lawful for a Magistrate to pass sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding Rs.5000 and it is further provided that in the course of a summary trail, if it appears to a Magistrate, that the nature of the case requires passing of a sentence of imprisonment, exceeding one year, the Magistrate, after hearing the parties, record an order to that effect and thereafter recall any witness and proceed to hear or rehear the case in the manner provided in Criminal Procedure Code.

16. Even though the case relating to an offence under Section 138 of Negotiable instruments Act is a summons case, it has to be tried summarily and Section 262 to 265, Cr.P.C. shall apply. In the course of summary trail, if the nature of the case is

such that a sentence of imprisonment exceeding one year may have to be passed or for any other reason, it is undesirable to try the case summarily, then it is always open to the Magistrate to hear the parties and record an order to that effect and thereafter recall any witness and proceed to hear or rehear the case as per the procedure in trail of summons case.

17. In the present cases, as concluded above, the petitions filed under Section 245 and 203, Cr.P.C. seeking for discharge of the accused are not legally sustainable in view of the law declared by the supreme Court and the impugned common order discharging the respondent/accused is liable to be set aside on this legal ground alone. Hence, It is not necessary to consider the other contention.

18. In the result, both the revision cases are allowed and the common order, dated 7.8.2003, passed in Crl.M.P.No.422/2003 in STR.No.9688/1999 and Crl.M.P.No.423/ 2003 in STR.No.9689/1999 on the file of learned Judicial Magistrate No.II, Pondicherry is set aside and the discharge petition are dismissed and both the cases are restored to file. Heaving regard to the fact that the Summary Trail Cases are of the year 1999, the Trail Court shall dispose them in accordance within a period of two months from the date of receipt of the records.