(2004) 06 KL CK 0076

High Court Of Kerala

Case No: C.R.P. No. 1365 of 2004

Vasudevan		APPELLANT
	Vs	
State of Kerala		RESPONDENT

Date of Decision: June 24, 2004

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 2, 200, 203, 204, 3
- Negotiable Instruments Act, 1881 (NI) - Section 145

Citation: (2005) 1 ALD(Cri) 38 : (2005) 3 BC 238 : (2005) 1 CivCC 440 : (2005) 1 KLT 220 : (2005) 1 RCR(Criminal) 744

Hon'ble Judges: R. Basant, J

Bench: Single Bench

Advocate: P.M. Pareeth, for the Appellant; K.G. Bhaskaran, Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

R. Basant, J.
Is the proceedings u/s 200 Cr.P.C. "inquiry" as defined u/s 2(g) Cr.P.C? Is the sworn statement recorded before the Magistrate u/s 200 Cr.P.C. "evidence"? Can the affidavit filed u/s 145 of the N.I. Act be received by a Court to proceed further without insisting on the personal appearance of the complainant? These questions of contextual relevance are thrown up for consideration in this Revision Petition.

2. The complainant, in a complaint u/s 138 of the N.I.Act, has preferred this revision petition against the order passed by the learned Magistrate "closing" the complaint. I extract below the impugned order:

"Complainant absent. It appears that complainant is not interested to proceed with this case. The Criminal M.P. is closed".

3. The learned counsel for the petitioner first of all contends that a criminal complaint cannot be disposed of with an order like the one extracted above. The Code of Criminal Procedure speaks of termination of a complaint at the stage of 203 Cr.P.C. by dismissal. It does not permit closure of complaint, submits the counsel. I do agree with the learned counsel for the petitioner. The order that the complaint is closed at that stage cannot be said to be one having legal sanction. The impugned order, for that reason itself, warrants interference.

4. The learned counsel for the petitioner has taken me through the facts of the case. The complainant had filed the complaint u/s 138 of the N.I. Act. He had also filed an affidavit u/s 145 of the N.I.Act. The counsel contends that though the affidavit u/s 145 of the N.I. Act was filed, the learned Addl. Chief Judicial Magistrate was not prepared to accept and act on the said affidavit. The learned Magistrate unnecessarily insisted on the personal appearance of the petitioner/ complainant before the learned Magistrate to record his sworn statement u/s 200 Cr.P.C. That is the real reason that prompted the learned Magistrate to pass the impugned order, it is submitted.

5. That takes us to the interesting question as to whether the Criminal Court should accept and would be justified in accepting, an affidavit filed u/s 145 of the N.I.Act in the proceedings before it at the stage of Section 200 Cr.P.C.

6. Section 200 Cr.P.C. mandates that if a private complaint is filed, the Magistrate must proceed to examine the complainant and his witnesses, if any, present. The law appears to have zealously, insisted on such personal appearance of the complainant at the stage of taking cognizance. Exceptions are carved out and it is stipulated that such examination need not be done if the complaint is filed by a public servant acting or purporting to act in the discharge of his official duties. Such examination is not also necessary where a Court has made the complaint. Proviso (b) to Section 200 further stipulates that such examination of the complainant and recording of sworn statement need not be done if the Magistrate makes over the case for enquiry or trial u/s 192 Cr.P.C. to another Magistrate. In all other cases, such examination has to be made. The Code does not provide for any other exception.

7. A Division Bench of this Court had occasion to consider whether in a complaint u/s 138 of the N.I. Act, such examination ought to be undertaken or not. In the decision reported in Harihara Iyer v. State of Kerala 2000 (1) KTL 100, it was made clear that in a complaint u/s 138 of the N.I. Act, such examination of the complainant is mandatory and cannot be dispensed with.

8. The learned counsel for the petitioner contends that the N.I.Act has been amended and the provision in Section 145 of the N.I.Act has been incorporated in the Act subsequent to the said decision evidently to permit cognizance being taken without personally examining the complainant and accepting the affidavit filed. I

extract below Section 145 of the N.I. Act:--

"Evidence on affidavit- Notwithstanding anything contained in the Code of Criminal Procedure. 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions, be read in evidence in any enquiry, trial or other proceedings under the said code;

2. The Court may, if it thinks fit and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence only as to the facts contained therein"

9. A perusal of the statement of objects and reasons which prompted the Parliament to enact the Negotiable Instruments and Miscellaneous Provisions Act, 2002 makes it very clear that it was intended "to prescribe procedure for dispensing with preliminary evidence of the complainant". A perusal of the objects and reasons clearly show that the legislature, and the working group set up by the legislature, were alarmed by the huge pendency of prosecutions u/s 138 of the N.I.Act. They identified the stipulation of law that the complainant must be examined u/s 200 Cr.P.C. at the preliminary stage as one stumbling block to expeditious disposal of the complaints u/s 138 of the N.I. Act. The introduction of Section 145 in the N.I. Act by amendment was specifically calculated to remedy this malady. It is thus that Section 145 has been brought into the statute book. Therefore, the decision of the Division Bench reported in Harihara Iyer''s case can have no application now. The non obstante clause u/s 145 of the N.I. Act must further convey to the Court convincingly that the stipulation u/s 200 that the Court shall examine the complainant on oath, cannot fetter the sweep of Section 145 of the N.I. Act.

10. The learned counsel for the petitioner submits that the learned Magistrate has chosen not to accept the affidavit u/s 145 Cr.P.C. of the Act as the learned Magistrate entertained the impression that sworn statement of the complainant and witnesses recorded u/s 200 Cr.P.C. cannot be reckoned as "evidence" and the proceedings u/s 200 Cr.P.C. cannot be reckoned as "enquiry, trial or other proceedings" under the Code of Criminal Procedure.

11. I find no merit in this assumption also. As early as in Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonker and Another, , it is indicated that procedure prior to an order of dismissal u/s 203 (or cognizance u/s 204) is enquiry. Going by the first principles also, at the stage of Section 200 Cr.P.C, the Court is only considering on the basis of the materials available before it, whether there are sufficient grounds to proceed against the accused. Materials are available before the Court. The complaint is available. Sworn statement of the complainant and witnesses are available. Mind of the Court is applied to these materials judicially to decide whether the matter deserves to be proceeded with further by issue of process u/s 204 Cr.P.C. or whether proceedings deserve to be terminated by dismissal of the complaint u/s 203 Cr.P.C. In any view of the matter, the proceedings before the Criminal Court at

that stage would certainly qualify to be "inquiry" as defined u/s 2(g). u/s 2(g), inquiry means every inquiry, other than trial, conducted under this Code by a Magistrate or Court. In this view of the matter, the proceedings before the Magistrate u/s 200 Cr.P.C. whereunder the Magistrate considers the materials available before him to decide whether a judicial order of dismissal u/s 203 Cr.P.C. or a judicial order of issue of process u/s 204 Cr.P.C. should be passed, would certainly be inquiry u/s 2(g). The objection raised that Section 145 of the N.I.Act cannot apply for the reason that the proceedings is not inquiry, cannot hence be accepted.

12. The only other question is whether the sworn statement of the complainant can be reckoned as evidence.The learned Magistrate appears to be under the impression that the sworn statement of the complainant cannot be reckoned as evidence for the purpose of Section 145 and consequently the affidavit contemplated cannot be accepted as evidence.

13. On this aspect also we have the observations in Harihara Iyer''s case which clearly show that at the stage of Section 200 Cr.P.C, the Criminal Court is conducting an enquiry and is considering the evidence available before it. I extract the relevant passage below:-

"We therefore hold that the enquiry envisaged u/s 200 is for ascertaining the truth or falsehood of the complaint and also for ascertaining whether there is any evidence in support of the complaint so as to justify the issue of process"

14. Even otherwise, from principle also, I find no merit in the contention that the sworn statement of the complainant and witnesses u/s 200 Cr.P.C. will not qualify to be evidence. Section 3 of the Evidence Act defines evidence in the following words:-

"Evidence"- Evidence means and includes (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry''

such statements are called oral evidence;

15. All statements which the Court permits or requires to be made before it by witnesses in relation to facts under inquiry would be evidence. The provisions regarding the manner in which examination of witnesses is to take place and the order of examination in Chapter X of the Evidence Act cannot be pressed into service to decide whether the sworn statement recorded u/s 200 Cr.P.C. will be evidence or not. Any statement which the Court permits or requires to be made before it by witnesses, whether such statement be tested by a cross examination or not, will certainly be evidence for the purpose of Section 3. In these circumstances, the contention that sworn statement would become evidence, only if and after opportunity for cross examination is granted, cannot also be accepted. On this aspect also, there can be no dispute and the question is clearly covered in Rakesh and Another Vs. State of Haryana, . Considering the ambit of the expression,

"evidence" appearing in Section 319(1) Cr.P.C. the Supreme Court had held that the sworn statement in chief examination, even when not tested by a cross-examination, would continue to be evidence for the purpose of Section 319. In a still earlier decision in Santhosh De & Anr.v. Archna Guha & Ors. 1995 AIR SCW1725, the Supreme Court, while considering Section 245(3) of the Code of Criminal Procedure, which was in force in West Bengal, had held that the expression "evidence" therein need not be restricted only to statements made on oath before Court which are tested by a cross examination. Still later, in Gopalakrishnan v. State of Kerala 2001 (2) KLT 767, a learned Judge of this Court has held that u/s 244 Cr.P.C, the accused has no absolute right for cross examination of a witness, notwithstanding the fact that the statutory provision in $.244(1) employs the expression "evidence".

16. Thus, it follows from the above discussions that the proceedings before the Criminal Court at a stage prior to Section 203/204 Cr.P.C. will be inquiry. The statement of a complainant to be recorded u/s 200 Cr.P.C. will be evidence. In these circumstances, Section 145 of the N.I.Act squarely applies and it will be permissible for the Court to receive the affidavit filed u/s 145 of the N.I. Act at the stage of Section 200 Cr.P.C. and to act upon the same. It is unnecessary ordinarily to insist on personal appearance of the complainant to tender the sworn statement at that stage.

17. I have no hesitation to opine that the Courts are obliged to follow that course. The Parliament and the working group set up by the Parliament had come to the conclusion that preliminary evidence can be recorded by receiving evidence on affidavit without insisting on personal appearance and examination of the complainant. The Legislature was prescribing a remedy for a malady which it perceived. Courts cannot insist that the complainant must appear before Court and tender sworn statement in all cases. Such insistence would certainly run counter to the mandate of Section 145 of the N.I.Act. The purpose of Section 138 of the N.I. Act would be stultified and frustrated if there is no expeditious disposal of the complaints u/s 138 of the N.I.Act. The Legislature had permitted reception of affidavits by complainants as evidence in prosecutions u/s 138 of the N.I.Act. to achieve that result. It is therefore imperative, unless the case on hand falls within the ''just exception'' contemplated u/s 145 of the N.I.Act that the Criminal Courts must receive affidavits as evidence at the stage of Section 200 Cr.P.C. also and should not insist on personal appearance and examination of the complainant to give sworn statement.

18. The anxiety of the learned Magistrate is understandable. At the stage of Section 203/204 Cr.P.C. a Magistrate is expected to alertly apply his mind to ensure rejection of a frivolous complaint and admission of a bona fide and genuine complaint. Even when Section 145 of the N.I. Act permits reception of evidence of the complainant by affidavit without insisting on the complainant giving sworn statement personally

before Court, alert application of mind to the contents of affidavit is called for. Mechanical admission of complaint is not contemplated. Application of mind to the complaint and the affidavit filed by the complainant u/s 145 of the N.I.Act, must certainly precede the passing of an order u/s 203/204 Cr.P.C. Therefore, while declaring that sworn statement of the complainant need not be recorded and an affidavit of the complainant u/s 145 of the N.I.Act, can and must ordinarily be accepted, it must be mentioned that alert application of mind to the contents of the affidavit and the complaint is necessary at that stage.

19. It follows from the above discussions that the learned Magistrate was wrong in closing the complaint without accepting the affidavit filed by the complainant and without considering the same to decide whether an order u/s 203 or 204 Cr.P.C. should be passed. The impugned order does, certainly warrant interference.

20. In the result

a) This revision petition is allowed.

b) The impugned order is set aside.

c) The learned Magistrate is directed to consider the complaint and the affidavit filed by the complainant u/s 145 of the N.I. Act and decide whether an order u/s 203 or 204 Cr.P.C. should be passed.

21. The complainant is directed to appear before the learned Magistrate on 2.8.2004 to continue the proceedings. He can of course appear through pleader. I make it clear that it is not necessary to insist on the personal appearance of the complainant when such affidavit is considered by the learned Magistrate.