

**Mohammed Kutty Vs. Mohammed**

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**Court : Kerala**

**Decided On : Jun-09-2006**

**Reported in : III(2007)BC770; 2006CriLJ3601; 2006(3)KLT447**

**Judge : R. Basant, J.**

**Acts : Negotiable Instruments Act - Sections 138; [Code of Criminal Procedure \(CrPC\)](#) , 1973 - Sections 200, 202, 203 and 204; Indian Penal Code (IPC) - Sections 420**

**Appeal No. : Crl.R.P. No. 726 of 1996**

**Appellant : Mohammed Kutty**

**Respondent : Mohammed**

**Advocate for Def. : T.K. Kunhabdulla, Public Prosecutor**

**Advocate for Pet/Ap. : M.K. Dileep Kumar, Adv.**

**Disposition : Petition allowed**

**Judgement :**

ORDER

**R. Basant, J.**

1. How is a Magistrate under Section 200 Cr.P.C. 'to examine upon oath the complainant and the witnesses present'? What is the role of the learned Magistrate at that stage of the proceedings'? Is the Magistrate to function in an activist and dynamic manner to elicit the relevant information from the complainant and his witnesses? Is the Magistrate only to record what the complainant and his witnesses state on oath? These are the interesting questions that arise for consideration in this case.

2. The petitioner went before the learned Magistrate with a complaint under Section 138 of the Negotiable Instruments Act and Section 420 of the Indian Penal Code. The crime relates to a cheque for Rs. 10,000/-. The complainant was put in the witness stand and his statement was recorded. Paragraphs 2 and 3 of the impugned order reveal what precisely had happened. I extract the same below:

2. The sworn statement of the complainant was recorded on 8.1.96. He has stated that on 20.8.95 the respondent borrowed an amount of Rs. 10,000/- from him. There after on 21.9.95 the respondent gave a cheque to the complainant for Rs. 10,000/- which when presented was dishonoured for insufficiency of funds. Complainant had only stated that he had thereafter handed over the cheque to the Advocate. The sworn statement was read over to the witness in open Court by me twice. The complainant refused to state anything further.

3. On perusal of the sworn statement of the complainant, I am satisfied that the complainant does not have a case that he issued a lawyer notice within the stipulated time and that the respondent failed to pay the amount afterwards. Under these circumstances, I am of opinion that no offence under Section 138 of Negotiable Instruments Act and Section 420 Indian Penal Code is made out from the sworn statement of the complainant. The complaint is therefore dismissed under Section 203 Cr.P.C.

(emphasis supplied)

3. The learned Counsel for the petitioner submits that there is total lack of appreciation of the jurisdiction of the learned Magistrate. The learned Magistrate reduced himself to the position of a recording machine little realising the dynamic

role which the Magistrate has to play at the stage of Section 200 Cr.P.C. In doing so, the learned Magistrate abdicated the real function of the Magistrate at that stage and acted only as a person testing the memory of the complainant. In these circumstances, the impugned order may be set aside and the learned Magistrate may be directed to consider the matter afresh. This is the short prayer.

4. As the dismissal is at the stage of Section 203 Cr.P.C and the accused has no role to play at this stage, the learned Judge who admitted the revision petition dispensed with the requirement of notice to the accused. This revision petition filed in 1996 remains in the file and has not been disposed of yet.

5. It has often been repeated that at the stage of Section 200 Cr.P.C, the Magistrate is not to function as a trial court. It is held in *Kewal Krishnan v. Suraj Bhan and Anr.* 1980 (Supp) Supreme Court Cases 499 thus:

10. In the instant case, there was prima facie evidence against Suraj Bhan accused which required to be weighed and appreciated by the Court of Session. At the stage of Sections 203 and 204, Criminal Procedure Code in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see whether on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under Sections 200 and 202, Criminal Procedure Code, there is prima facie evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is 'sufficient ground for proceeding' against the accused. At this stage, the magistrate is not to weigh the evidence meticulously as if he were the trial Court. The standard to be adopted by the magistrate in scrutinising the evidence is not the same as the one which is to be kept in view at the stage of framing charges. This Court has held in *Ramesh Singh* case, that even at the stage of framing charges the truth, veracity and effect of the evidence which the complainant produces or proposes to adduce at the trial, is not to be meticulously judged. The standard of proof and judgment, which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of framing charges. A fortiori, at the stage of Sections 202/204, if there is prima facie evidence in support of the allegations in the complaint relating to a case exclusively triable by the Court of Session, that will be

a sufficient ground for issuing process to the accused and committing them for trial to the Court of Session.

6. The role of the Magistrate at that stage is only to ascertain whether there are sufficient grounds to proceed. It is for the learned Magistrate to play the role assigned to him under the Code fully and ascertain whether there is sufficient ground to proceed. A reading of the relevant provisions in Chapter XV of the Code of Criminal Procedure would indicate that the counsel for the complainant has no specific role when the complainant and his witnesses are examined under Section 200 Cr.P.C. Such examination must be conducted by the Magistrate. The mandate of Section 200 Cr.P.C is that the magistrate shall examine the complainant and the witnesses present. At the trial stage, the counsel for the complainant will be there to examine the complainant and assist the Court But at the stage of Section 200 Cr.P.C, the law does not specifically enable the counsel for the complainant to adduce evidence. It is the duty of the magistrate to examine the complainant.

7. It is as much the duty of a court to ensure conviction of the guilty as it is its duty to spare the innocent accused. The magistrate must be conscious of this duty when he proceeds to examine the complainant and the witnesses on oath under Section 200 Cr.P.C. It is total abdication of the duty on the part of the Magistrate to fail to ascertain the requisite details and necessary data from the complainant and his witnesses. Complainant and witnesses may be ignorant persons. They may not have the ability to memorise or the awareness to furnish to the Magistrate details of the ingredients of the offences. This is where the role which a learned Magistrate should play becomes important.

8. It is by now trite that such examination of the complainant and his witnesses can be done by the Magistrate by looking at the complaint and the details. Even when there is no written complaint and only an oral complaint is made, it is the duty of the learned Magistrate to inquisitively ascertain all the relevant details. The Magistrate is not at the stage of Section 200 Cr.P.C merely testing the faculties of memory of the complainant and the witnesses. His commitment at that stage must be to the larger interests of justice. Any magistrate who reduces himself to a recording machine to record what the complainant and his witnesses are

attempting to reproduce from their memory is certainly guilty of the indiscretion of not imbibing the commitment which Section 200 Cr.P.C, expects them to imbibe. The learned Magistrate in this case, who after realising that the complainant has not on his own volunteered vitally relevant information of what happened after the cheque was handed over to the counsel, remained content by reading over the deposition twice was certainly guilty of gross indiscretion. He should have probed further as to what happened and whether any notice was issued.

9. I am in these circumstances in ready agreement with the learned Counsel for the petitioner that there has been gross impropriety committed by the learned Magistrate in the manner of recording the statement. Once the complainant says that he had approached the counsel it was certainly incumbent on the Magistrate, if the magistrate had read the complaint and the magistrate were aware of the ingredients of the offence punishable under Section 138 of the Negotiable Instruments Act to put questions farther to the complainant and ascertain whether anything further had been done and whether notice of demand had been issued. In merely reading over the sworn statement of the complainant twice the learned Magistrate did omit to perceive the real role assigned to him by the Code.

10. I do further find merit in the submission of the learned Counsel for the petitioner that even assuming that in such situation the learned Magistrate was not satisfied that cognizance cannot be taken by mere examination of the complainant/his witnesses under Section 200 Cr.P.C, the learned Magistrate was obliged to proceed further and conduct an enquiry or investigation under Section 202 Cr.P.C. A permissive enabling discretion is conferred on the magistrate under Section 202 Cr.P.C to examine the complainant and his witnesses or to get an investigation conducted. In a case where the magistrate feels that the complainant has not revealed all the requisite information and the magistrate for valid reasons does not himself want to pursue the matter further, the magistrate must certainly have proceeded to the stage under Section 202 Cr.P.C and conducted the necessary inquiry/investigation. In not doing so also the learned Magistrate has certainly erred. This is not to say that in every case before an order of dismissal under Section 203 Cr.P.C is passed, inquiry/investigation under Section 202 Cr.P.C is invariable. But in a case like the instant one, where the learned

Magistrate appears to have been satisfied that the complainant is not revealing on his own all information, the learned Magistrate must certainly play a more dynamic role in examining the complainant. At any rate, the complaint could not have been dismissed without an effort to elicit relevant information and before the provisions of Section 202 Cr.P.C were invoked by the learned Magistrate.

11. At the risk of repetition, I would like to state that the magistrates at the stage of cognizance - before passing an order under Sections 203 and 204 Cr.P.C. - must be conscious of the onerous responsibility on their shoulders. They must ascertain whether there is sufficient grounds to proceed. A bona fide complainant with a legitimate grievance should not be deterred at the threshold without giving him a fuller and effective opportunity to substantiate his grievances. A complainant acting mala fide and with oblique motives must certainly be shown the door at that stage and should not be permitted to abuse the process of court and thus vex and harass a person who does not deserve to be visited with criminal proceedings against him. The magistrate in the instant case has not perceived that sublime duty and has not acted in a manner expected of him.

12. In Hameed v. Sugathan 1981 KLT 235, Hon'ble Khader (J) had occasion to deal with the duty and the discretion of the learned Magistrate to put questions to the complainant at the stage of examination under Section 200 Cr.P.C. The Supreme Court has in several cases - See Kewal Krishnan v. Suraj Bhan and Anr. 1980 (Supp) Supreme Court cases 499 and Rosy and Anr. v. State of Kerala and Ors. : 2000 CriLJ930 adverted to the role which a magistrate is expected to play at the stage of taking cognizance. The impugned order does not at all reveal application of mind in the proper manner to such duty cast on the magistrate. The impugned order in these circumstances deserves interference.

13. In the result:

a) This revision petition is allowed.

b) The impugned order is set aside.

c) The learned Magistrate is directed to dispose of the complaint afresh in accordance with law. The learned Magistrate shall further examine the complainant under Section 200 Cr.P.C.

14. The complainant shall appear before the learned Magistrate on 17.07.2006 to continue the proceedings.

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