
(2000) 08 CAL CK 0010
In the Calcutta High Court
Case No : C.R.R. No. 686 of 1992

Badal Adhikary	Vs	APPELLANT
Swapan Adhikary		RESPONDENT

Date of Decision : 18-08-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 155(2), 251, 465
Penal Code, 1860 (IPC) — Section 323

Citation : (2001) 2 ILR (Cal) 120

Hon'ble Judges : Debiprosad Sengupta, J

Bench : Single Bench

Advocate : Himangshu De and Arunava Jana, for the Appellant; Amitava Karmakar, for Private Opposite Party, for the Respondent

Final Decision : Allowed

Judgement

Debiprosad Sengupta, J.—This revisional application is against an order dated December 19, 1991, passed by the learned Sessions Judge, Purulia thereby setting aside the order of the learned Magistrate and refusing to discharge the Petitioners in a non-cognizable Case u/s 323 Indian Penal Code.

2. On the basis of a complaint lodged by the opposite party No. 1 para P.S. G.D.E. Entry No. 226 dated July (5, 1990 was registered. On the basis of the said information the police enquired the matter without taking prior permission of the learned Magistrate to investigate non-cognizable offence as contemplated u/s 155(2) of the Code of Criminal Procedure, which is a mandatory provision. On August 18, 1990 the learned Magistrate took cognizance of the offence and issued process against the Petitioners. On August 31, 1990 the Petitioners appeared before the learned Magistrate and was granted bail. The accused persons were examined u/s 251 of the Code of Criminal Procedure. At that stage the Petitioner filed an application before the learned Magistrate praying for discharge on the ground of non-compliance of Section 155(2) of the Code of Criminal Procedure. The learned Magistrate by His order dated April 6, 1991

discharged the accused Petitioners from the case as enquiry was made by police in violation of the provision of Section 155(2) Code of Criminal Procedure. Against the said order of Learned Magistrate the complainant moved the learned Sessions Judge, who was of the view that prior permission of the court was not taken by the Investigating Officer, but there was no miscarriage of justice as the accused persons were not prejudiced in any way. Accordingly he directed the learned Magistrate to proceed with the trial of the case according to law. Challenging the said order of the learned Sessions Judge the Petitioners came up before this Court in revision.

3. Mr. Himangshu De, learned Advocate appearing for the Petitioners submits that from the order-sheet dated August 6, 1990 it appears that the Investigating Officer prayed for permission of the learned Magistrate. But actually such prayer was not made on August 6, 1990, and the date was interpolated and permission was actually sought for on August 16, 1990 when the investigation into the non-cognizable offence was complete. It is the submission of Mr. De that it appears from the records of the case that enquiry was completed on August 13, 1990, but no permission was obtained from the Magistrate prior to August 13, 1990. Actually such permission was obtained on August 16, 1990 but the records were manipulated and was shown as August 6, 1990 to show as if the permission was obtained prior to the enquiry. From the impugned order passed by the learned Sessions Judge it appears that the learned Judge himself was of the view that it is apparent that first date of the order-sheet in the record of G.R. Case No. 361/90 before the learned Judicial Magistrate bears evidence of interpolation of date. Similar interpolation was also made as pointed out earlier on the right hand corner of the top of the prosecution report under the signature of the Chief Judicial Magistrate. But inspite of such finding the learned Judge was of the view that even assuming that permission to investigate the non-cognizable offence was not taken, then also the learned Magistrate should not have discharged the accused persons unless it is shown that there has been miscarriage of justice. The learned Judge was of the view that there was no miscarriage of justice even if it is presumed that police investigated the non-cognizable case without obtaining the permission of the learned Magistrate. Mr. De relies on a judgment in *Ratan Sarkar v. State*, *Pannalal Manna v. State* 1990 Cri.L.R. (Cal.) 179 and *Harilal Shaw v. State of West Bengal* 89 C.W.N. 557. The ratio of all the aforesaid decisions is that once a provision of law is held to be mandatory, the question of the same being curable does not arise and any question of prejudice to the accused cannot arise as the same is irrelevant for the purpose. If a mandatory provision is not complied with then the act complained of has to be struck down irrespective of any question of prejudice. Mr. De next relies on a judgment in *Keshablal Thakur v. State of Bihar* 1997 S.C.C. (Cri.) 298. In the said decision of the Hon'ble Apex Court held as follows:

We need not go into the question whether in the facts of the instant case the above view of the High Court is proper or not for the impugned proceeding has got to be quashed as neither the police was entitled to investigate into the

offence in question nor the Chief Judicial Magistrate to take cognizance upon the report submitted on completion of such investigation. On the own showing of the police, the offence u/s 31 of the Act is non-cognizable and therefore the police could not have registered a case for such an offence u/s 154 Cr P.C. Of course, the police is entitled to investigate into a non-cognizable offence pursuant to an order of a competent Magistrate u/s 155(2) Cr P.C. but admittedly, no such order was passed in the instant case. That necessarily means, that neither the police could investigate into the offence in question nor submit a report on which the question of taking cognizance could have arisen.

4. The learned Advocate appearing for the opposite party submits that even if no permission is taken from the Learned Magistrate to investigate a non-cognizable offence, the same cannot vitiate the proceeding. Such defect is curable one in view of the provision of Section 465 of the Code of Criminal Procedure. He relies on a judgment of *Satya Narayan Panday v. State of West Bengal* 1991 CrL. L.R. (Cal.) 95. I have carefully gone through the said judgment and in my considered opinion the said judgment does not have any manner of application in the present case.

5. I have heard the learned Advocates of the respective parties. I have carefully gone through the impugned order passed by the learned Sessions Judge. In my considered opinion, the impugned order passed by the learned Judge suffers from serious illegality which warrants interference by this Court. It is clear that the learned Magistrate took cognizance of the offence on the basis of an investigation by the police which was conducted without an appropriate order u/s 155(2) of the Code of Criminal Procedure, which is a mandatory provision.

6. In view of the discussion made above and relying on the decision of the Hon''ble Apex Court as referred to above I allow this application and set aside the impugned order passed by the learned Sessions Judge and quash the impugned proceeding.