

(2004) 03 BOM CK 0111

In the Bombay High Court

Case No : Criminal Application No. 2628 of 2003

Banwarilal Purohit and Another

APPELLANT

Vs

Ramdeo Baba Sahkari Griha Nirman Samiti Limited and
Another

RESPONDENT

Date of Decision : 05-03-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 202, 482
Penal Code, 1860 (IPC) — Section 465, 467, 471

Citation : (2004) 4 MhLj 341 : (2005) 1 RCR(Criminal) 248

Hon'ble Judges : S.R. Sathe, J

Bench : Single Bench

Advocate : M.G. Bhangde and V.V. Bhangde, for the Appellant; R.S. Parsodkar, for non-applicant No. 1 and S. Ahirkar, Assistant Public Prosecutor for non-applicant No. 2, for the Respondent

Judgement

S.R. Sathe, J.—Being aggrieved by the order dated 13-8-2003, passed by the 4th Additional Sessions Judge, Nagpur, in Criminal Revision No. 20/2002, whereby the revision filed by the applicants against the order dated 30th November, 2001, passed by the J.M.F.C., refusing to recall the process issued by him, is dismissed, the applicants/original accused have preferred this application u/s 482 of Criminal Procedure Code.

2. Brief facts giving rise to this application are as under : The non-applicant No. 1/complainant filed a complaint, i.e. Criminal Complaint Case No. 370/1995 under Sections 465, 467, 471 against the applicants and 2 others on 11-9-1995. Then on 13-9-1995 statement of non-applicant No. 1 was recorded and the learned J.M.F.C., passed the following order :

"Read statement of complainant on oath. Register as warrant case."

3. Thereafter on 5-10-1995 the learned Magistrate passed further order as under :

"Read complaint and complainant. Perused xerox copy of the document filed on record. I think that matter requires further enquiry. Hence, following order. P. I. Sadar is directed to enquire into the allegations and submits its report u/s 202 of Criminal Procedure Code on or before 5-11-1995". However, no report was submitted on 5-10-1995 and then the matter was adjourned from time to time, i.e. on 6-11-1995, 17-11-1995, 24-11-1995 and 7-12-1995. Even on 7-12-1995 no report u/s 202 of Criminal Procedure Code was received. However, on that day, the regular court was on leave and the matter was placed before the In-charge Court, viz. J.M.F.C., Court No. 6, Nagpur and the Court directed to issue process against the accused. In pursuance of the said order, the applicants/accused appeared. They also engaged advocate. Thereafter the case was adjourned from time to time and according to the applicants some time before 7th July, 2001 when the case was fixed for evidence before charge, they realised that the learned Magistrate had in fact called a report from concerned police station u/s 202 of Criminal Procedure Code. But, though said report was not received, the order regarding issue of process was passed. Hence, on 7-7-2001, the applicants submitted an application Exhibit-72 for recalling the process alleging therein that as enquiry u/s 202 of Criminal Procedure Code was directed, the order regarding issue of process in the absence of such report was illegal. The said application was opposed by the non-applicant/original complainant by filing reply Exhibit-78.

4. After hearing both the learned Advocates, the learned Magistrate was pleased to reject the said application Exhibit-72. Being aggrieved by the same, the applicants/accused filed Criminal Revision No. 20/2002 before the Sessions Judge, Nagpur. However, the same was also dismissed, vide order dated 30-8-2003 by the Court of IVth Additional Sessions Judge, Nagpur. Hence, the applicants filed the present application and prayed that the order passed by the Court of J.M.F.C., as well as Revisional Court be quashed and the Criminal Complaint No. 307/1995 be dismissed.

5. In this application before me, Shri Bhangde, the learned Advocate for the applicants, strenuously argued before me that once the learned Magistrate had directed enquiry u/s 202 of Criminal Procedure Code, it was obligatory on the part of the Magistrate to pass further orders only on receipt of the report. However, the learned Magistrate instead of waiting for the report, straightway passed the order of issue of process on the basis of the material which was in fact before him on the day of directing enquiry u/s 202 of Criminal Procedure Code and thus there was no any additional sufficient material to show commission of offence, as alleged by the complainant. He also argued before me that as according to the learned Magistrate the material before him was not sufficient to issue process and it was necessary to ascertain and to have further information about the truth or otherwise of the allegations made in the complaint and the statement of the complainant, he had directed investigation u/s 202 of Criminal Procedure Code. So, under such circumstances, the order of issue of process was illegal. In order to substantiate this proposition, he has placed

reliance on several rulings. As against this, Shri Parsodkar, the learned Advocate for the non-applicant No. 1 contended that as the report was not received from the concerned police station for a long time, the Magistrate proceeded to take further step and as he found that the material on record was sufficient to issue process, he issued the process. He also submitted that if we take into consideration the material on record, viz. the complaint, the statement of the complainant and other relevant documents, then it can very well be said that the order of issue of process was justified. He also argued before me that if the report is not submitted by the Police in time, then court cannot wait for indefinite period and under such circumstances the action taken by the learned J.M.F.C., as regards issue of process is legal and correct. In order to substantiate this proposition, he has also placed reliance on certain rulings.

6. The main and the material point to be decided in this matter is when a Magistrate dealing with a criminal complaint, takes cognizance thereof, postpones issuance of process and directs a police officer to investigate and submit a report u/s 202(1) of the Code of Criminal Procedure, 1973, whether it is proper on his part to issue process at a later date on the same material before receipt of the report called for? In order to answer this question, it would be worthwhile to see what Section 202(1) says. It runs as follows :

"202. Postponement of issue of process.--(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him u/s 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding; Provided that no such direction for investigation shall be made, --

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath u/s 200."

6-A. Section 203 of Criminal Procedure Code says thus :

"203. Dismissal of complaint. -- If, after considering the statements on oath (if any) of the complaint and of the witnesses and the result of the inquiry or investigation (if any) u/s 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing."

7. From perusal of Section 203 of Criminal Procedure Code it is very clear that once the report is called u/s 202, the same has to be considered and then only further action namely dismissal of complaint u/s 203 of Criminal Procedure Code or issuing process u/s 204 can be taken. If the Magistrate finds that the material on record is sufficient to issue process then even after perusal of the complaint

and the statement of the complainant and documents, if any, the Magistrate can straightway issue process. But, when the Magistrate finds that the material on record is not sufficient and it is necessary to inquire into the matter and directs an inquiry u/s 202 of Criminal Procedure Code, question arises whether on the same material which was at one point of time was found inadequate or insufficient, can be the basis for issue of process? In fact this issue has been considered on several occasions by our High Court as well as by other High Courts. Shri Bhangde, the learned Advocate for the applicants has drawn my attention to a case *Hamchandra and Anr. v. Ramrao and Anr.* 1990(2) Cri 746, wherein this High Court has held that once the Magistrate insists on some additional material for his subjective satisfaction, it is necessary for him to withhold the issuance of the process till additional material augmenting the subjective satisfaction is received. Same view has been taken in other cases *Kunwarjee Jivraj Lodhaya and Ors. v. Bhagchand Motilal Raka and Anr.* 1992 M.L.J. 377 ; *P.K. Ramkrishna and others Vs. Neelkanth M. Kamble and another*, . In fact, long back in 1925, similar view was taken by Calcutta High Court (*Krishna*) AIR 1929 Cal 989, wherein it was held where subordinate Magistrate has taken cognizance of a case and has issued process, the Chief Judicial Magistrate has no power to interfere and or an inquiry. On the other hand, if Magistrate directs a local inquiry, he cannot issue process before he receives the report of the inquiry. It was further observed that where an investigation was ordered u/s 202 of Criminal Procedure Code, the Magistrate should wait for the result of the investigation. He should not issue summons against the accused as the report had not arrived and because he thought that the case could no longer be kept pending. In the instant case, if we take into consideration the date which was given for submission of the report and the order of issue of process, it appears that on the date of issue of process it was not a case where the report was pending for long unreasonable time. On the contrary, it appears that only period of about two months had lapsed. So, there was in fact no necessity for the learned Magistrate to pass hurriedly the order of issue of process. He could have very well called upon the concerned police officer to submit his report by taking actions in that behalf.

8. Shri Parsodkar, the learned Advocate for the non-applicant No. 1 has drawn my attention to a case *Shriram Damodar Muley v. Ratanlal Mathuradas Kedia and Ors* 1980 M.L.J. 765. In that case, the Magistrate had ordered inquiry u/s 202 of Criminal Procedure Code on 23-12-1977, till 5-8-1978 the report was not received. Under the circumstances, it was held that the action of the Magistrate proceeding to take cognizance and directing issuance of process upon the material already available before him, cannot be said to be without jurisdiction. However, Shri Bhangde, the learned Advocate for the applicants submitted that the above observations of the Division Bench in the said case cannot be said to be binding, and in fact, that cannot be said to be the ratio, because it suffers from the concept of "sub silentio". For this proposition, he has placed reliance on a case *Municipal Corporation of Delhi Vs. Gurnam Kaur*, , wherein, Their

Lordships have observed thus :

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind, the court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."

9. So, the Apex Court has very clearly held that the precedents sub silentio and without arguments are of no moment. If we see the above cited ruling of our Division Bench, then from the observations in paragraph 5 of the said judgment, it is very clear that the point with regard to issuance of process, without receipt of the report u/s 202, once it was called, was not at all for consideration for the said Bench, as the said point was not at all pressed. So the observations of the Division Bench with regard to the effect of issuing process without waiting for the report u/s 202 of Criminal Procedure Code is hit by concept of "sub silentio", and as such, the said ruling is of no use to the non-applicant No. 1. On the contrary, the learned Advocate for the applicants has drawn my attention to a case *Mohammad Ataullah Vs. Ram Saran Mahto*, . In that case, the Magistrate had called for a report u/s 202 of Criminal Procedure Code from the Executive Officer of Samastipur Municipality, who of course was told the Magistrate. The Executive Officer of Samastipur Municipality submitted a cryptic report on the basis of which process was issued against three persons by the Magistrate. The Apex Court while quashing the process held that there was no additional material warranting issuance of process as report submitted u/s 202 of Criminal Procedure Code was very cryptic and not disclosing any additional material. So even in a case when the report was received, but no additional material was disclosed, it was held by the Apex Court that process cannot be issued on the same material which was available before directing inquiry u/s 202 of Criminal Procedure Code. The present case is worst than that. Here the report was not received at all. Naturally, when such is the position, the Magistrate should not have proceeded further, i.e. for taking steps either u/s 203 or Section 204 of Criminal Procedure Code. So, taking into consideration the observations of the Apex Court in the above cited ruling, it has to be held that the order passed by the learned J.M.F.C., issuing process, though he had not received the report u/s 202 of Criminal Procedure Code, as asked by him, cannot be said to be legal and proper. It is true that the applicants did not raise any objection for the issuance of process when they appeared and it is only when the case came for hearing, they raised objections for the same. However, that by itself will not make the order legal, which was illegal or improper for the reasons mentioned above.

10. In this view of the matter, I think that there is necessity to exercise jurisdiction u/s 482 of Criminal Procedure Code and quash the order of issue of process against the applicants. Hence, the order of issue of process against the applicants is set aside and consequently the orders passed by the Magistrate on Exhibit-72 and the order passed by the revisional court are set aside. The case is remitted back to the concerned Magistrate for considering the question of issue of process afresh after the report of Police Officer u/s 202 of Criminal Procedure Code is received. The concerned Police Station is directed to submit a report forthwith within a period of four weeks from today, in case report is not already submitted and the learned Magistrate shall thereafter consider the question afresh in accordance with law. It is made clear that no opinion about the merits of the case has been expressed by this Court in this order.