
(2015) 05 CAL CK 0029
In the Calcutta High Court
Case No : C.R.R. No. 289 of 2013

Biswajit Mondal

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 15-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 190, 192, 197, 200

Citation : (2015) 3 CHN 730 : (2015) CriLJ 3941

Hon'ble Judges : Shib Sadhan Sadhu, J

Bench : Single Bench

Advocate : Probal Kumar Mukherjee, Jayanta Narayan Chatterjee, Paromita Mukhopadhyay and Apalak Basu, for the Appellant

Judgement

Shib Sadhan Sadhu, J.—The petitioner by means of the present petition under Section 401 read with Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C. for brevity) seeks to quash/set aside the impugned order dated 21st November, 2012 passed by the Learned Additional Sessions Judge, Kalna in connection with Criminal Revision No. 27 of 2012 whereby and whereunder he set aside the impugned order No. 6 dated 3rd February, 2012 passed by the Learned Additional Chief Judicial Magistrate, Kalna, Burdwan in C.R. Case No. 129 of 2011 and recalled all orders in furtherance of such impugned order.

2. The factual matrix leading to the filing of the instant Revisional Application in brief is that on 04.10.2011 at about 4:30 p.m. while the petitioner was going to attend call of his patient he found the accused person Nos. 1, 2, 3, 4, 5, 6, 7 and 8 named in the petition of complaint (Annexure P-1 at page 15) were passing foul comments towards the ladies with the intention to spoil the "Sit and Draw" competition among the children organized by "Mahila Samity". He intervened and protested. The aforesaid accused Nos. 1 to 8 abused him and assaulted him with fists, blows, slaps and kicks and they also snatched away Rs. 1650/-, his wrist watch and some important papers. They also broke his motor cycle. The

petitioner then informed Kalna P.S. about the incident over phone. Immediately thereafter the accused No. 10 arrived at the spot with some staff. The petitioner approached the said officer when he abused the petitioner and dragged him catching hold of his collar. In the meantime accused No. 9 came there and he also assaulted the petitioner and also they took him to Kalna P.S. where he was humiliated and kept confined without any reason. After being released the petitioner was treated in Kalna Sub-Divisional Hospital. He was also treated in Bangur Hospital, Kolkata. He wrote letters to the District Magistrate, Superintendent of Police, Chairman of Human Rights Commission, Chief Secretary, etc on 10th October, 2011. Thereafter, he filed the petition of complaint before the Court of the Learned Additional Chief Judicial Magistrate, Kalna who on receipt of the complaint took cognizance and thereafter he examined the petitioner under Section 200 Cr.P.C. No other witness was present. Considering the gravity of the offence alleged, the Learned Magistrate called for a report from the Sub-Divisional Police Officer, Kalna. On receipt of the report and its consideration, the Learned Magistrate was of the opinion that the report of the SDPO, Kalna did not have any reflection about the entirety of the incident and as also it did not ventilate the role of the others, he passed order for further enquiry and directed the complainant to produce his witnesses on 22.12.2011. On 03.02.2012 the Learned Magistrate examined two other witnesses on SA produced by the complainant and took cognizance and then issued process against all the accused persons namely accused No. 1 to 10 named in the petition of complaint, the accused No. 9 and 10 being the present O.P. Nos. 2 and 3. Being aggrieved with such order the O.P. Nos. 2 and 3 preferred a revision which was registered as C.R. Case No. 27 of 2016 and the Learned Additional Sessions Judge, Kalna after hearing the parties passed the impugned order. Challenging such order the instant Revisional Application has been filed by the petitioner.

3. I have heard Mr. Probal Mukherjee, the Ld. Advocate appearing on behalf of the petitioner. I have also heard Mr. Milon Mukherjee, Ld. Advocate appearing on behalf of the O.P. Nos. 2 and 3. I have perused the entire materials available on record including the impugned orders. Further I have carefully gone through the written arguments filed by both the parties and also through the photo copy of Ruling Sankar Chandra Ghose Vs. Roopraj S. Bhansally, (1981) CriLJ 1002 : 85 CWN 944 submitted by Mr. Milon Mukherjee. However, inspite of taking time, no case law was filed by the Learned Advocate for the petitioner although reference of some Rulings has been made in the written argument.

4. Be that as it may on the face of rival arguments advanced by the Learned Advocates two questions arise for consideration:-

(i) Whether the Learned Magistrate after directing an enquiry under Section 202 Cr.P.C. can switch over to the provisions of Section 190/200 of the Cr.P.C.

(ii) Whether cognizance can be taken and process can be issued against a member of a police force appointed under the Police Act without prior sanction in

terms of sub-section (3) of Section 197 of the Cr.P.C.

5. At the very outset let me refer to the relevant provisions of law which I think have a direct bearing upon the issue of controversy with which we are concerned.

6. Section 190 falls in Chapter XIV of the Cr.P.C. and reads as under:

"S. 190. Cognizance of offences by Magistrates.--(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence--

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

Chapter XV of the Code deals with the complaints to Magistrates. It has four Sections 200 to 203, which read as under:

"S. 200 Examination of complaint.--A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses--

(a) If a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) If the Magistrate makes over the case for inquiry, or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

S. 201. Procedure by Magistrate not competent to take cognizance of the case.--If the complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall,--

(a) If the complaint is in writing, return it for presentation to the proper court with an endorsement to that effect;

(b) If the complaint is not in writing, direct the complainant to the proper court.

S. 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 under Section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction 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 Session; 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 under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

S. 203 Dismissal of complaint. If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under Section 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."

Chapter XVI of the Code has Sections 204 to 210. Section 204 deals with the issuance of process by the Magistrate. The process is issued by the Magistrate if in his opinion there is sufficient ground for proceeding.

7. In *Tula Ram and Others Vs. Kishore Singh*, AIR 1977 SC 2401 : (1978) CriLJ 8 : (1977) 4 SCC 459 : (1978) 1 SCR 615 , considering the power of a Magistrate to take cognizance under Sections 190, 200 to 204 in context to the provisions of Section 156(3) Cr.P.C. and Section 202 Cr.P.C. to order investigation, the Hon"ble Supreme Court on interpretation of the provisions laid down the following legal propositions:-

"1. That a Magistrate can order investigation under Section 156(3) Cr.P.C. only at

the pre-cognizance stage, that is to say , before taking cognizance under Sections 190, 200 to 204 and where a Magistrate decides to take cognizance under the provisions of Chapter XIV he is not entitled in law to order any investigation under Section 156(3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Section 202 of the Code.

2. Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives:

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceedings he can straightway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by police.

3. In case, the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceedings he can dismiss the complaint.

4. Where a Magistrate orders investigation by the police before taking cognizance under Section 156(3) of the Code receives the report thereupon he can act on the report and discharge the accused or straightway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 as described above."

8. In a recent decision *Manharibhai Muljibhai Kakadia and Another Vs. Shaileshbhai Mohanbhai Patel and Others*, (2013) CriLJ 144 : (2012) 4 JCC 3105 : (2012) 10 JT 61 : (2012) 9 SCALE 671 : (2012) 10 SCC 517 : (2012) AIRSCW 5314 the Hon"ble Supreme Court held thus:-

9. "23. Section 202 of the Code has twin objects; one, to enable the Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an unnecessary, frivolous or meritless complaint and the other, to find out whether there is some material to support the allegations made in the complaint. The Magistrate has a duty to elicit all facts having regard to the interest of an absent accused person and also to bring to book a person or persons against whom the allegations have been made. To find out the above, the Magistrate himself may hold an inquiry under Section 202 of the Code or direct an investigation to be made by a police officer. The dismissal of the complaint under Section 203 is without doubt a pre-issuance of process stage. The Code does not permit an accused person to intervene in the course of inquiry by the Magistrate under

Section 202. The legal position is no more *res integra* in this regard. More than five decades back this Court in *Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonker and Another*, AIR 1960 SC 1113 : (1961) 1 SCR 1 with reference to Section 202 of the Criminal Procedure Code, 1898 (corresponding to Section 202 of the present Code) held that the inquiry under Section 202 was for the purpose of ascertaining the truth or falsehood of the complaint, i.e. for ascertaining whether there was evidence in support of the complaint so as to justify the issuance of process and commencement of proceedings against the person concerned.

24. In *Chandra Deo Singh Vs. Prokash Chandra Bose and Another*, AIR 1963 SC 1430 : (1964) 1 SCR 639 , a four-Judge Bench of this Court had an occasion to consider Section 202 of the old Code. The Court referred to the earlier decision of this Court in *Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonker and Another*, AIR 1960 SC 1113 : (1961) 1 SCR 1 and few previous decisions, namely, *Parmanand Brahmachari Vs. Emperor*, 116 Ind. Cas. 46 ., *Radha Kishun Sao Vs. S.K. Misra and Another*, AIR 1949 Patna 36 , *Ramkisto Sahu Vs. The State of Bihar*, AIR 1952 Patna 125 , *Emperor Vs. J.A. Finan*, (1931) 33 BOMLR 1182 , *Baidya Nath Singh Vs. Muspratt and Others*, (1887) ILR (Cal) 141 and it was held that the object of provisions of Section 202 (corresponding to present Section 202 of the Code) was to enable the Magistrate to form an opinion as to whether process should be issued or not and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath. It was further held that an accused person does not come into the picture at all till process is issued."

10. In the case of *Hanumantappa Krishnappa Mantur and others Vs. State of Karnataka*, AIR 1992 SC 599 : (1992) CriLJ 405 : (1992) 2 SCC 213 Supp the Hon"ble Supreme Court has held that the scope of enquiry under Section 202 of the Code is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should issue or not under Section 204 of the Code or whether the complaint should be dismissed by resorting to Section 203 of the Code on the footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any.

11. Therefore, from the aforesaid exposition of law there is no scope for harbouring even the slightest doubt that the scope of enquiry under Section 202 of the Cr.P.C. is extremely limited and restricted to only for assisting the Magistrate to enable him to decide as to the sufficiency of the grounds for proceeding and nothing more.

12. But in the instant case the Learned Magistrate did not follow such established procedure of law and he repeated the exercise afresh and again took cognizance and examined witnesses and then issued the process. Such course adopted by the Learned Magistrate is absolutely illegal being contrary to the provisions of the statute. It has been held by Their Lordships of the Hon"ble Division Bench of this

Court in the case of Sankar Chandra Ghose Vs. Roopraj S. Bhansally, (1981) CriLJ 1002 : 85 CWN 944 that the Section 202 Cr.P.C. empowers the Magistrate to employ one or the other alternatives and he cannot employ two or more of the alternatives one after the other nor can he employ two or more alternatives simultaneously. It was further held by Their Lordships that where the Magistrate after receipt of the report of the police officer under Section 202 allowed the prayer of the complainant for judicial enquiry and fixed the date for further enquiry, the order of further enquiry, i.e., second enquiry would be incompetent.

13. In the case of Santosh Kumar Himatsingka and Others Vs. Snowlion Automobiles Ltd. and Another, (2007) CriLJ 2351 Hon"ble Sikkim High Court held that an approach of adopting one procedure initially and then switching over to the next one and passing a hybrid composite order is contrary to the procedure laid down in the Code.

14. The Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judicial discretion has to be exercised in accordance with law and set of legal principles. The discretion which encourages illegality or perpetuates illegality cannot be exercised. Therefore, my answer to the first question is that the Learned Magistrate cannot switch over to the provisions of Section 190/200 of the Cr.P.C. after directing an enquiry under Section 202 Cr.P.C. Accordingly I find and hold that the Learned Additional Sessions Judge, Kalna very correctly set aside such order passed by the Learned Magistrate on 03.02.2012 by passing his impugned order dated 21.11.2012.

15. Coming to the second question i.e. whether taking cognizance and issuance of process against the O.P. Nos. 2 and 3 without prior sanction in terms of Sub-section (3) of Section 197 of the Cr.P.C. is per se illegal I would like to say that the provision mentioned in Section 197 Cr.P.C. clearly indicates that previous sanction is required for prosecuting only such public servants who could be removed by sanction of the Government. Therefore, without having any material like West Bengal Police Manual which prescribes different departmental punishments, including the punishment of dismissal and removal to be inflicted upon the police officers up to the rank of Inspector of Police, it is very much difficult if not impossible to jump to such conclusion.

16. To conclude the discussion, the revision having no merit is dismissed. The impugned order dated 29.11.2012 passed by the Learned Additional Sessions Judge, Kalna is hereby affirmed. However, it is made clear that the criminal proceeding shall continue as usual against the non O.Ps. i.e. accused Nos. 1 to 8 named in the petition of complaint. No order as to costs.

17. Criminal Section is directed to deliver urgent photostat certified copy of this judgment to the parties, if applied for, as early as possible.