

(1993) 08 MAD CK 0026

In the Madras High Court

Case No : Criminal O.P. No's. 5838 and 6142 of 1993

J. Ranganathan, Second Income Tax Officer

APPELLANT

Vs

M.S. Bhavani

RESPONDENT

Date of Decision : 25-08-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 244, 244(2), 245, 245(2)
Income Tax Act, 1961 — Section 276C, 276C(1), 277

Citation : (1994) 209 ITR 600

Hon'ble Judges : N. Arumugham, J

Bench : Single Bench

Advocate : Ramasamy K., Special Public Prosecutor, for the Appellant;

Judgement

N. Arumugham, J.—The petitioners in both the applications are the complainants before the Judicial Magistrate, No. 1, Poonamallee, before

whom they have filed two complaints against the respondent/accused who is one and the same person alleging the offences under sections 193,

420 read with section 511 of the Indian Penal Code and sections 276C(1) and 277 of the Income Tax Act, 1961, and upon doing so, cognizance

of the said offences was taken by the learned magistrate in two different cases, namely, in C.C. Nos. 152 of 1984 and 153 of 1984. While the

said case were pending before him at the stage above referred to - challenging the same and to quash both the cases, quash proceedings u/s 482

of the Criminal Procedure Code were filed on behalf of the accused/respondent herein in this court. But, however, both resulted in total rejection.

Consequently, the matter was about to be taken for trial. At this stage, it appears that a petition u/s 245(2) of the Criminal Procedure Code has

been filed on behalf of the accused/respondent herein before the learned judicial

magistrate praying for the discharge of the accused. But at the same time, a petition on behalf of the petitioner herein u/s 244 of the Code has also been filed requesting the learned magistrate to issue process as prayed on behalf of the petitioner by passing the following order :

Aggrieved at this order, as it causes great injustice to the petitioner herein who is the Income Tax Officer, he has come forward with this petition seeking a direction to the learned magistrate to proceed with the trial of the case in accordance with law by virtue of the power vested u/s 482 of the Criminal Procedure Code.

2. The brief facts leading to the filing of complaints involved in the above cases projected on behalf of the petitioner are stated as follows : The accused in both the cases, Dr. Mrs. M.S. Bhavani, wife of A. Thanikachalam, Vijaya Reddiar Buildings, No. 35, M.T.H. Road, Avadi, Madras 54, has wilfully fabricated her account books for the period from April 1, 1981, to March 31, 1982, relevant for the Income Tax assessment year 1982-83 by suppressing her real receipts in the receipt books maintained by her and handed over the same through her representative, an advocate, to the Assistant Director of Inspection (Investigation) of the Income Tax Department, in a proceeding before the Income Tax authority and thereby committed the offence as aforesaid, u/s 193 of the Indian Penal Code. It was also further alleged that she had attempted to cheat the Income Tax Officer wilfully and dishonestly by inducing him to deliver valuable property in the form of an Income Tax assessment order for the said assessment year and thereby committed an offence u/s 420 read with section 511 of the Indian Penal Code. The further allegations project that she had attempted to evade tax, penalty and interest accrued thereon chargeable under the Income Tax Act attracting the offence u/s 276C(1) of the Income Tax Act and that by filing a false Income Tax return for the said assessment year 1982-83, it was alleged that she had committed an offence punishable u/s 277 of the Income Tax Act, 1961. Since similar allegations pertaining to the offences are involved in both the cases, but, however, since they relate to a different period, two separate cases have been registered and taken on file by the learned magistrate as aforesaid.

3. The only contention of Mr. K. Ramasami, learned counsel appearing on behalf of the Income Tax officials, raised before me is that while passing

the impugned order the learned judicial magistrate, No. 1, Poonamallee, as extracted above in Tamil, has clearly violated the mandatory norms u/s

244 of the Criminal Procedure Code and that even so, assuming to consider the merits or otherwise of the prosecution case to pass any order,

both oral and documentary evidence are necessarily to be recorded by the learned magistrate and without doing so, by issuing due process under

the Code passing the impugned order is clearly an error of law, causing very serious prejudice and in fact it amounts to the very scuttling of the

procedural mandate prescribed in the Code of Criminal Procedure. Therefore, on this ground alone, learned counsel would contend that the

impugned order is liable to be set aside and proper directions may be given pursuant to the inherent powers of this court u/s 482 of the Code.

4. Though the above two petitions were admitted and interim stay has been granted by this court, notice of the same were ordered to be served

upon the respondent. Though it was served, the respondent had not entered appearance nor engaged a counsel and, therefore, there was thus no

contra representation made on behalf of the respondent herein in both the cases.

5. This is a case where complaints have been instituted before the learned Judicial Magistrate, No. 1, Poonamallee, by the Income Tax authorities

who are officers contemplated and defined in the Code of Criminal Procedure. Therefore, there is no difficulty at all to observe that sections 244

and 245 of Chapter XIX-B of the Code are applicable to the case on hand. Before proceeding further, it is worthwhile to extract sections 244 and

245 of the Code in the context of the grievance exposed before me which runs as follows :

244. Evidence for prosecution. - (1) When, in any warrant case instituted otherwise than on a police report, the accused appears or is brought

before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the

prosecution.

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any

document or other thing"".

Section 245(1) and (2) of the Code reads like this :

245. When accused shall be discharged. - (1) If, upon taking all the evidence

referred in section 244, the Magistrate considers for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

6. A plain reading of sub-section (1) of section 244 of the Criminal Procedure Code clearly leads to the fact that in a warrant case instituted

otherwise than on a police report like the one in the instant case by the Income Tax authorities before the learned Judicial Magistrate, No. 1, in the

context, the accused appears or is brought before him, the magistrate shall proceed to hear the prosecution, and take all such evidence as may be

produced in support of the prosecution, which would mean clearly that all the evidence, both oral and documentary, produced by the prosecution

shall be necessarily recorded by the learned magistrate. That act of the learned magistrate is held mandatory and not directory or obligatory. Even

though his duty to take all such evidence produced by the prosecution is clearly mandatory in this provision, it is quite a pity and rather unfortunate

that the learned magistrate has failed to perform the same and also ignored it as if he is not aware of the said provision of law. This section is further

qualified by sub-section (2) in the context that for the said purpose, enjoined in sub-section (1), on the application made by the prosecution, the

magistrate may issue the process to all such persons to attend and produce any document or other witness before him as required by the

prosecution. Therefore, a combined reading of both sub-sections (1) and (2) of section 244 of the Criminal Procedure Code makes it clear, rather

mandatory, that the magistrate shall necessarily record all the evidence both oral and documentary adduced by the prosecution on instituting a case

as contemplated under this section.

7. Then coming to section 245(1) of the Criminal Procedure Code, the very object and scheme provided u/s 244(1) and (2) of the Criminal

Procedure Code would be fortified and further qualified by sub-section (1) of section 245 of the Criminal Procedure Code. The language

adumbrated in sub-section (1) "if, upon taking all the evidence referred to in

section 244, the magistrate considers, for reasons to be recorded would clearly emphasise the fact that before the learned magistrate decides whether there is a case or not for the prosecution, he shall record every evidence as provided u/s 244 of the Criminal Procedure Code and he must give the reasons for such conclusion he has to arrive for the purpose of sub-section (2) of section 245 of the Code or to discharge as provided therein. The word "groundless" in sub-section (2) of section 245 of the Code would clearly mean that the evidence must be such that no conviction can be rested on it. A combined reading of the above sub-sections of law clinchingly enjoins the fact that the duty of the learned magistrate in recording such of the evidence, both oral and documentary, produced by the prosecution to be recorded is not only onerous but also a mandatory one, before passing the order of discharge or otherwise. If the sections of law above referred to are to be taken to mean in this way, perhaps, may be the proper interpretation, then there may not be any difficulty for the learned magistrate to pass the impugned order in the petition by the prosecution u/s 244(2) of the Code to issue the process. However, he has overlooked the same. In short, without recording any evidence or ascertaining from any other documentary evidence, a petition filed on behalf of the accused praying for the discharge u/s 245(2) of the Code cannot at all be entertained and cannot be even thought of for a moment.

8. In the decision in Rama Devi and Another Vs. State of Bihar and Another, , a single judge of the High Court has held as follows (headnote) :

The question whether the persons accused of an offence should be discharged or a charge should be framed against them or not can be decided

only after following the procedure laid down in the Criminal Procedure Code.

Held accordingly, that as the prosecution did not examine any witness, the question of discharging the accused at that stage did not arise.

9. In yet another case. R.S. Nayak Vs. A.R. Antulay and Another, , the apex court has observed as follows (headnote) :

The power to discharge is exercisable u/s 245(1) when "the magistrate considers, for reasons to be recorded, that no case against the accused

has been made out which, if unrebutted, would warrant his conviction....." It is a fact that sections 227 and 239 provide for discharge being

ordered before the recording of evidence and the consideration as to whether

charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge u/s 245, on the other hand, is reached only after the evidence referred to in section 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the magistrate is required to consider the question of framing of charge u/s 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections the legal position is that if the trial court is satisfied that a prima facie case is made out, charge has to be framed.

10. In *R.S. Nayak Vs. A.R. Antulay*, , the apex court has held as follows (headnote) :

Where cognizance of an offence is taken u/s 8(1), the judge has to hold trial according to the procedure prescribed in chapter XIX-B, i.e., the procedure prescribed in sections 244 to 247 of the Code. To be precise, the judge has to try the case according to the procedure prescribed for cases instituted otherwise than on police report.

11. The case-law decided by my learned brother Arunachalam J. in *S.A.R. Somasundaram Vs. Assistant Commissioner of Income Tax*, , is also relevant to be quoted in the context of the present case. The learned judge in the aforesaid ruling has observed as follows (headnote) :

Held, dismissing the petition, that it had been contended that the complaint had been filed by a person who was not competent to do so and that the penalty imposed had been set aside in appeal, though subsequent to the filing of this prosecution, Both these contentions related to appreciation of evidence by the trial Magistrate and more so when certain documentary evidence would have to be brought on record to scrutinise the validity of these submissions. The contentions related to mixed questions of law and fact and it would be more appropriate to urge these during trial. The complaint could not be quashed.

12. Therefore, unfortunately on the basis of the said observation, the learned judge was not inclined to quash the said proceedings.

13. With the strength of these legal ratios enunciated and referred to above and

making them applicable to the case in hand it is apparent that without taking any evidence, both oral and documentary, the learned judicial magistrate was not inclined to issue process and thereby to record any evidence to be let in on behalf of the prosecution, as contemplated u/s 244 of the Code. But at the same time, it is very interesting to note that a petition filed on behalf of the accused u/s 245(2) of the Code praying for the discharge was entertained by the learned magistrate. But, however, he added the same with the original case records. The total irony of the entire case is that the learned Magistrate, while refusing to issue process as specifically contemplated u/s 244(2) of the Criminal Procedure Code, kept the petition filed on behalf of the petitioner pending and has not even looked into it. It is thus that the procedure adopted by the learned magistrate has become quite unknown to procedural law and practice, which in my considered view not only amounts to a denial of fair justice but also protracting the proceedings for any length of time. In the light of the above legal ratio, the non-recording of any evidence by the learned magistrate even after a request was made by the prosecution is illegal and contrary to the procedure and that, therefore, the impugned orders is liable to be set aside and it has no leg to stand for a single minute. While saying so, in the interest of justice, it is justifiable and highly proper on my part to give direction to the learned magistrate to proceed with the recording of the evidence as provided u/s 244 of the Criminal Procedure Code, after issuing the process as requested and to dispose of the case in accordance with law. He is not entitled to stop the proceedings on the pretext of the petition being filed one after another by the accused as identified in this case.

14. In the result, the petitions succeed and stand allowed. Accordingly, the learned Judicial Magistrate, No. 1, Poonamallee, is hereby directed to issue process to all the witnesses and record evidence, both oral and documentary, and to dispose of the case in accordance with law as expeditiously as possible and without being delayed any more.