
(1971) 02 MAD CK 0041
In the Madras High Court

Jagadeesa Thevar and Others

APPELLANT

Vs

Rajabakiya Thevar

RESPONDENT

Date of Decision : 24-02-1971

Acts Referred:

Child Marriage Restraint Act, 1929 — Section 5

Citation : (1971) CriLJ 1350

Hon'ble Judges : K.N. Mudaliyar, J

Bench : Single Bench

Judgement

K.N. Mudaliyar, J.—These 11 petitioners seek to revise the order of the Sub Magistrate, Pattukottai, who has conducted an enquiry u/s 202, Cr.PC by the examination of P. Ws. 1 and 2. P.W. 1, Rajabakiya Thevar is the complainant. His complaint was taken on file for offences Under Sections 4 and 5 of the Child Marriage Restraint Act (Act No. 19 of 1929) by the Sub Divisional Magistrate, Mannargudi u/s 10 of the said Act. On receipt of a complaint by P.W. 1, the Sub Divisional Magistrate directed the Sub Magistrate, Pattukottai to make an enquiry u/s 202, Criminal P.C. The said Magistrate completed the enquiry u/s 202 and ultimately found that there is sufficient evidence in the case and that the accused shall stand their trial in the court of the learned Sub Divisional Magistrate, Mannargudi. It is against this order that this revision petition is directed.

2. Mr. R. G. Rajan, the learned Counsel for the petitioners argued that the Sub Divisional Magistrate took cognisance and issued process against the accused petitioners and that the issue of process is clearly not authorised by law and such illegality vitiates the order of the Sub Magistrate. In support of this argument, the learned Counsel cited the authority reported in the State of Gujarat v. Jivraj Khimji, ILR (1966) Guj 815 and also the ruling reported in In Re: Darapureddi Jaggu Naidu and Others, . It is not clear from the later decision of Pandrang Row, J. when the learned Judge observes that "the issue of process implies that cognisance was taken without any preliminary enquiry being held as required by Section 10, that the process cannot be issued at ail. If the learned Judge meant

that process to the person complained against was issued and in that sense cognisance was taken, it was still open to the Sub-Divisional Magistrate or the Joint Magistrate to hold a preliminary enquiry as contemplated u/s 202, Cr.PC I am unable to see as to how the issue of process is therefore unauthorised by law. With great respect to the learned Judge I am unable to follow the reason found in the judgment of Pandrang Row, J. in In Re: Darapureddi Jaggu Naidu and Others, .

3. Shelat, J. held in ILR (1966) Guj 815 that "as the satisfaction of the Magistrate is considered essential u/s 10 of the Act, this provision is of a mandatory character; and in the absence of any such preliminary inquiry made by the Magistrate the process issued against the accused would not be justified in law." The learned Judge further held that it is not possible to regard the breach of the mandatory provision of Section 10 of the Act as a procedural irregularity curable u/s 537 of the Criminal P.C. even though no prejudice is caused to the accused. It was also held that the contravention of the mandatory provision contained in Section 10 of the Act would amount to an illegality which would vitiate the order of issuing process against the accused in the case. The learned Judge further observed that the High Court, however, would have the power to direct the Magistrate to make an enquiry himself u/s 10 of the Act read with Section 202 of the Criminal P.C., and then if he is satisfied with the truth of the complaint, to issue process against the accused. I am unable to see as to how this decision is of any assistance to the petitioners in view of the completion of the preliminary enquiry by the Sub Magistrate, Pattukottai.

4. Any Magistrate on receipt of a complaint of an offence of which he is authorised to take cognisance may do one of the two things. (1) He may for reasons to be recorded in writing, if he thinks fit, postpone the issue of process for compelling the attendance of the person complained against. The content of the power vested in the Magistrate to postpone the issue of process for compelling the attendance of the person complained against, would also cover the power of issuing process for compelling the attendance of the person complained against. (2) After doing one of these two things, the Magistrate may either enquire into the case himself or he can direct any magistrate subordinate to him to make an enquiry only for the limited purpose of ascertaining the truth or falsehood of the complaint. In view of the terms of Section 202, Criminal P.C. the Sub Divisional Magistrate, Mannar-gudi, was certainly justified in directing the Sub Magistrate, Pattukottai, to make an enquiry or investigation for the purpose of ascertaining the truth or falsehood of the complaint. The Sub Magistrate had examined P. Ws. 1 and 2 in this case and ultimately found that there is sufficient evidence. It is true that the accused were present during the examination of P. Ws. 1 and 2; and at one stage of the arguments a grievance was made that P. Ws. 1 and 2 were not subjected to cross-examination by the petitioners. In my view, the Sub Magistrate was really justified in denying opportunity to the petitioners to cross-examine P. Ws. 1 and 2 during the enquiry u/s 202 (1), Criminal P.C. The petitioners were the persons complained against.

Only u/s 204, Criminal P.C., after the Sub Divisional Magistrate, Mannargudi takes cognisance of the offence u/s 4 or 5 of the Child Marriage Restraint Act, there would be summons issued for the attendance of the accused. I am fortified in this interpretation of Section 202 (1) Criminal P.C. by the law laid down by their Lordships of the Supreme Court in Chandra Deo Singh Vs. Prokash Chandra Bose and Another, :

It seems to us clear from the entire scheme of Ch. XVI of the Criminal P.C. that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this, therefore, that it would not be open to the Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued; nor can he examine any witnesses at the instance of such a person. Of course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice. But beyond that, he cannot go. It was, however, contended by Mr. Sethi for respondent No. 1 that the very object of the provisions of Ch. XVI of the Code of Criminal Procedure is to prevent an accused person from being harassed by a frivolous complaint and, therefore, power is given to a Magistrate before whom complaint is made to postpone the issue of summons to the accused person pending the result of an enquiry made either by himself or by a Magistrate subordinate to him. A privilege conferred by these provisions can, according to Mr. Sethi, be waived by the accused person and he can take part in the proceedings. No doubt, one of the objects behind the provisions of Section 202, Criminal P.C. is to enable the Magistrate to scrutinise 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 obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant. Whatever defence the accused may have can only be enquired into at the trial. An enquiry u/s 202 can in no sense be characterised as a trial for the simple reason that in law there can be but one trial for an offence. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the Legislature has made no specific provision permitting an accused person to take part in an enquiry.

5. The persons complained against could be present during the Section 202 enquiry or investigation.

6. The learned Counsel for the petitioners produced two forms of summons to the accused persons u/s 68 of the Criminal P.C. It is unfortunate that the said forms of process have mentioned the word "charge" Under Sections 4 and 5 of the Child Marriage Restraint Act. As Mr. Srinivasagopalan, the learned Counsel for the complainant submitted, the court may have due regard to the substance of the proceedings before the Sub Magistrate, Pattukottai, and not to the obvious form of the summons to the accused persons. Looking at the substance of the proceedings that have taken place before the Sub Magistrate, Pattukottai, whose order is now assailed before me, I am unable to see how these two summonses to the accused persons would really prejudice the petitioners. It would have been better if the Sub Magistrate or the Sub Divisional Magistrate chose to issue process strictly within the ambit of Section 202 (1), Criminal P.C.

7. Before parting with his order, the learned trial Magistrate took upon himself the task of adjudicating on the fact in issue before him in terms which are not sanctioned by law. His duty was limited only to the ascertainment of the truth or falsehood of the complaint before him. But when he gave a finding that accused 1 is liable u/s 4 of the said Act, I am afraid he went beyond the power vested in the Sub Magistrate. His language embodied in the judgment is not precise. But I am not again impressed that such a finding given by the Sub Magistrate, Pattukottai has in any way prejudiced the mind of the superior Magistrate, namely, the Sub Divisional Magistrate, Man-nargudi.

8. The learned trial Magistrate observed as follows:

There is no direct evidence that A-2 and A-5 to A-11 actively participated in the marriage and that they were present and helped the conduct of the marriage.

After saying this, the learned Sub Magistrate curiously enough observes as follows: "But it is better that they are tried for the offence u/s 5 of the said Act."

In view of such vague finding by the Sub Magistrate, Pattukottai, the question whether he should take cognisance of the offences alleged to have been committed by accused 2 and accused 5 to 11 or not, is left open to the Sub Divisional Magistrate, Mannargudi.

9. I find no merits in this revision petition and it is dismissed.