

**(1984) 03 PAT CK 0007**

**In the Patna High Court**

**Case No :** Criminal Miscellaneous No. 2592 of 1976

Laddu Lal Sahu and Others

APPELLANT

Vs

Dharnidhar Sahu and Others

RESPONDENT

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**Date of Decision :** 03-03-1984

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 202, 438, 484

**Citation :** (1984) 32 BLJR 424 : (1984) PLJR 693

**Hon'ble Judges :** S.S. Sandhawalia, C.J.; Ram Nandan Prasad, J; Nagendra Prasad Singh, J

**Bench :** Full Bench

**Final Decision :** Dismissed

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## **Judgement**

S.S. Sandhawalia, C.J.—The passage of time has rendered somewhat academic the otherwise significant question formulated in the terms following by the referring Division Bench:

Whether the word "application" in Clause (a) of Sub-section (2) of Section 484 of the Code of Criminal Procedure 1973 includes a petition of complaint?

2. What seems to be equally on the anvil is the correctness of the Division Bench view in Mahanth Barinar Das and Ors. v. The State of Bihar 1975 B.B.C.J. 364 which indeed has necessitated this reference to the larger Bench.

3. Somewhat apologetically it has to be mentioned that this pending proceeding arises from an incident of nearly 16 years ago. Way back in July 1968 one Asharfi Lal of village Mohammadpur lodged information about the body of Arbind Kumar, a boy of 9 years, which was said to have been found in a maize field in the vicinity of police station Mohiuddinagar. The house of the deceased, who was admittedly the son of the complainant Dharnidhar Sahu, was in the close vicinity of the said police station. Asharfi Lal Sah, above-mentioned, had cautiously stated that the deceased boy was missing from his house from 7 P M. on the preceding day, having gone to the fields in the evening to ease himself and there

were many cases reported about man-eater animals having devoured children in similar situations. It would appear that the body of the deceased without any post-mortem was made over to the aforesaid Asharfi Lal Sah, who was in no way related to the deceased, behind the back of the parents, who had gone to Patna, and he consigned the body in the water. An undetected case No. 4 of 1948 dated 30th of July, 1968, was consequently recorded wherein it was accepted that the same was a case of jackal bite.

4. However, when the parents of the deceased returned from Patna, Dharnidhar Sahu, the father of the deceased, lodged a complaint petition on the 19th of August, 1968, before the Sub-divisional Magistrate, Samasaipur, who sent it to the police station for institution of a case. The police, however did not even submit any first information report. It would appear that so far as the body of the deceased was concerned, only a piece of bone was later recovered from the water which was sent for post-mortem examination and was found to have mark of injury. Ultimately the complaint which could not be proved any further. Finding the police wholly indifferent in taking any interest in the matter, the mother of the victim then filed petition before the Superintendent of Police, Lahariasarai, in which the death of the boy was alleged to be at the hands of accused persons named therein because one of the accused Chaturi Sahu had thought this boy responsible for the death by drowning of his grandson a year before. The result of this petition, however, was virtually foregone due to the cold attitude of the police and ultimately on the 6th of October, 1970, a final report was submitted that the case was true but without sufficient evidence. Thereafter the protest petition already filed by the complainant was later converted into a complaint petition in which after examining the complainant on solemn affirmation the matter remained inordinately delayed for a considerable time till 1974 for want of the case diary. By this time the new Code of Criminal Procedure had come to be in force, The learned Magistrate had then directed the case to be sent for investigation u/s 202 of the Code of Criminal Procedure 1898 to the Executive Magistrate, Sarnastipur Municipality, who after inquiry also reported the case to be false.

5. However, when the matter was placed before the learned Chief Judicial Magistrate, he in a detailed and considered order dated 12th May, 1976, ultimately concluded as under:

Hence from the evidence of the witnesses examined by the E.O. and the circumstances noted above I find a prima facie case being made out for the offence of murder against the accused persons. Cognizance is, therefore, taken u/s 302 I.P.C.

6. It is against the aforesaid order that the present petition is directed, which is sought to be challenged, inter alia, on the ground that there is a legal bar against taking of the offence against the accused petitioners on the basis of evidence recorded by the Executive Magistrate u/s 202(1)(a) of the Code of Criminal Procedure 1973, When this petition came up before the Division Bench it was

pressed primarily on two grounds, namely, (1) The protest petition, which has formed the basis for passing the impugned order was not a complaint in the eye of law and consequently the order taking cognizance was invalid; and (2) the cognizance having been taken on the basis of an inquiry conducted by a Magistrate, which inquiry was contrary to the provisions of Section 202 of the Code of Criminal Procedure, 1973; and hence the taking of cognizance was illegal.

7. On the first ground the Division Bench categorically held that the protest petition in the present case was a complete complaint petition on which the Court could take action and consequently rejected the same. As regards the second ground, relying on a decision of the Supreme Court in *P. Philip Vs. The Director of Enforcement, New Delhi and Another*, the Bench was inclined to take the view that the word "application" in Section 484(2)(a) of the Code of Criminal Procedure, 1973 (hereinafter called the new Code)" includes a petition of complaint and, therefore, by virtue of the said provision the Code of Criminal Procedure, 1898 (hereinafter called "the old Code") would continue to apply to the proceedings. However, since view would run counter to the earlier view of the Division Bench in *Mahanth Harihar Das's case*.(supra), it was thought necessary to place the matter for consideration by a larger Bench vide the lucid order of reference dated the 30th of June, 1977.

8. Since the controversy herein must inevitably turn on the language of Section 484, of the new Code, it seems apt to read the relevant part thereof at the very threshold:

484 Repeal and Savings.-(1) The Code of Criminal Procedure, 1898 (5 of 1898), is hereby repealed.

(2) Notwithstanding such repeal.-

(a) if, immediately before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898 (5 of 1898) as in force immediately before such commencement (hereinafter referred to as the old Code), as if this Code had not come into force:

Provided....

(b)...

(c)...

(d)...

Now I proceed to focus pointedly on the scope of the word "application" in the aforesaid provision, it would call for particular notice that herein we are called upon to construe a repealing and saving provision. This indeed is manifest from the very heading of the section as also from the contents of its individual

clauses. Without being hyper technical or inflexible (and always keeping in mind that the ultimate quest of statutory construction is to arrive at the true intent of the legislature), it seems to be well settled that a saving clause is used to preserve from destruction certain rights, remedies or procedures already existing. Such a provision is introduced into an Act which repeals the earlier one in order to safeguard rights which but for such saving would be totally obliterated.

9. Nor must one be oblivious of the historical retrospect. It deserves recalling that the new Code had brought substantial changes in the law of criminal procedure, some of them even radical in nature, in comparison with those of the old Code. Nevertheless, the transition was sought to be made gradual and smooth in the larger scheme of the validity and continuity of the old procedure. This indeed appears from Clauses (a), (b), (c) and (d) of Sub-section (2) of Section 484. These in terms provide that any appeal, application, trial, inquiry or investigation pending immediately before the date of enforcement of the new Code must be disposed of in accordance with the old Code and indeed as if the new Code had not come into force. Equally all notifications published, proclamations issued, powers conferred, forms prescribed etc., under the old Code would be deemed respectively to have been so done under the corresponding provision of the new Code. The same general rule is made applicable to any sanction or consent granted under the old Code or every prosecution against a ruler of an erstwhile princely State. Therefore, viewed broadly, the provisions are plainly indicative of the fact that the intent of the legislature was not to nullify what had been done under the old Code while it held the field but indeed to continue the same with equal validity. The grand design, if one may say so, was to be a gradual take over by the new procedure whilst maintaining and continuing the proceedings pending under the old Code. It is in the context of this larger mosaic that it was specifically provided that an application (as also all appeals, trials, inquiries and investigations) would continue to be governed and disposed of in accordance with the provisions of the old Code as existing immediately before the date of the enforcement of the new Code and as if the same had not come into force.

10. In the light of the above, the question before us in a sense is—Was an exception to this general rule envisaged by the legislature with regard to a petition of complaint? Was it in terms contemplated that a complaint alone would be treated as an exception, whilst appeals, applications, inquiries and investigations would continue to be governed by the old Code if instituted thereunder. On the larger prospect, to my mind, no such exception seems to be intended by the legislature and unless compelling reasons exist to hold to the contrary, it seems difficult to attribute to the framers of the law any intention of treating a petition of complaint on a peculiarly different or exceptional footing.

11. Herein what perhaps calls for notice is the fact that the word "application" has not been defined either in the old or the new Code. Therefore, one has to fall back upon its ordinary dictionary meaning, which is of a somewhat wide

amplitude. From this angle a complaint is also an application to a Magistrate with a view to his taking action on allegations which may disclose an offence. It would thus appear that whilst the word "application" is the genus a complaint is only a species thereof. A somewhat liberal approach in this sphere is indicated by AIR 1932 165 (Privy Council). There in a somewhat analogous context of the CPC it was observed that an application may well in substance be deemed to be an appeal, in the under-mentioned terms:

In their Lordships' opinion there is no force in the first of these contentions, There is no definition of appeal in the Civil Procedure Code, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent.

To the same tenor is the passing observation in *The Seksaria Cotton Mills Ltd. Vs. The State of Bombay*, holding that in a Penal statute it is the duty of the Courts to interpret words of ambiguous meaning in a broad and liberal sense so that they would not become traps for honest, unlearned (in the law) and unwary men. I am, therefore, inclined to take the view that the word "application" in Section 484(2)(a) must be broadly and liberally construed.

12. Now once that is so, on the larger prospect; on principle; and the construction of the language of the statute; the same has equally to be viewed within the parameter of what has been authoritatively laid down in *P. Philip's* case (*supra*). Indeed it appears to me that the matter is virtually covered by the ratio of the said decision. Therein also a similar contention was sought to be urged that a criminal revision was not covered by the word "application" in Section 484(2)(a). Categorically rejecting such a contention their Lordships observed as follows:

It will be seen that the word "application" in the saving provision contained in Clause(a) of Sub-section (2) of Section 484 immediately follows the term "appeal". It therefore takes same colour from the collocation of words in which it occurs. It is synonymous with the terra "petition" which means a written statement of material facts, requesting the court to grant the relief or remedy based on those facts. It is a peculiar mode of seeking redress recognized by law. Thus considered, there can be no doubt that the word "application" as used in Clause (a) of Section 484 of the Code of 1973 will take in a revision application made u/s 435 of the old Code. Such a revision application does not cease to be an "application" within the purview of the aforesaid Clause (a) merely because in the event of the application being allowed, the Sessions Judge was required to make a reference to the High Court u/s 438.

In the light of the above it was concluded that a revision petition, which was pending at the time of the enforcement of the new Code, was required to be disposed of in accordance with the provisions of the old Code. Therefore, once

the final Court has held that the word "application" is to be widely construed so as to include a petition of revision therein, there seems to be no difficulty or impediment in holding that a complaint petition would be on an identical footing and would come within the scope and ambit of the word "application". Indeed herein the word "application" is used in its generic sense and petitions of complaint or revision would be only species thereof. Consequently, if not expressly, at least on the analogy of the binding precedent, it would appear that a petition of complaint is, to be equally covered and deemed to be within the four corners of the word "application" as employed in Section 484(2).

13. However, in fairness to Mr. Braj Kishore Prasad, learned Counsel for the petitioner, one must notice what appears to me an extremely ingenuous contention that the aforesaid view might well in a particular case involve some hardship to an accused person. It was submitted by him that under the old Code an enquiry and examination and examination of the complainant's witnesses were mandatory before commitment whereas by the new Code such an enquiry has been totally dispensed with in police cases. Consequently in a hypothetical situation some prejudice might ensue to an accused person committed to session on a complaint in so far that at the sessions trial he would not have a precise inkling of the nature of evidence against him or copies of statements given in the committing court.

14 The aforesaid submission, rested as it is plainly on an imaginary fear envisaged in a hypothetical situation, does not appear to me as at all germane to the issue. Even otherwise a plain and authoritative answer to such a contention is that no one has any vested right merely in a particular procedure prescribed by law. This is so on the oft quoted and well approved statement of the law (which has been repeatedly affirmed by the final Court itself) in the authoritative work of Maxwell : Interpretation of Statutes, 11th Edition, 216, namely:

No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode.

15. I must also notice that Mr. Prasad had then relied on the proviso to Section 202(2) of the new Code for contending that it was incumbent on the Magistrate not only to call upon the complainant to produce all his witnesses but it was equally mandatory that he must examine each one of them on oath. In support of this submission he relies on Ramchander Rao and Others Vs. Boina Ramchander and Another, ; Kamal Krishna De Vs. State and Another, ; Shyamkant v. State of Maharashtra AIR Cri L.J 1388 (Bom.) Smt. Anisa and Another Vs. Banne Khan, .

16. I would refuse to be drawn into the thicket of a controversy which to my mind does not appear to be even remotely relevant to the issue before us

Whether a Magistrate u/s 202(2) and the proviso thereto is obliged to examine each one of the complainant's witnesses on oath appears to have no connection whatsoever with the question before us whether the word "application" in Section 484(2)(a) includes within its sweep a petition of complaint as well. Consequently it seems wholly unnecessary to enter an arena altogether alien to the debate or to individually advert to the aforesaid judgments cited before us in support thereof.

17 In this context it is perhaps also instructive to refer to the observation of their Lordships of the Supreme Court in *Natabar Parida v. State of Orissa* AIR 1976 SC 1465 while construing Section 484(2)(a) of the new Code for holding that the old Code would continue to apply to certain pending proceedings, namely-

Immediately before the 1st day of April, 1974, the investigation of this case was pending. Saving Clause (a) therefore enjoins that the said investigation shall be continued or made in accordance with the provisions of the old Code. The police officer, therefore, making the investigation has to continue and complete it in accordance with Chapter XIV of the old Code

18. It, however, remains to advert to Mahanth Barihar Das's case (supra). A perusal of the Bench was whether after that enforcement of the new Code a Judicial Magistrate could be deemed to be a successor-in-office of the Executive Sub-divisional Magistrate to whom the matter had been sent down for enquiry. However, as incidental to the primary question, the issue now before us was also raised and paragraphs 5 and 6 of the report would indicate that the same was not adequately canvassed before their Lordships, the legislative history of the provision and the repealing and saving nature of Section 484 were not highlighted and were not even referred to. The issue was treated by the Bench as one of first impression and the primary basis for arriving at the conclusion seems to be that since the framers of the Code had not included the word "complaint" in Section 484(2)(a) it could not come within the ambit thereof or within the sweep of the word "application". That line of reasoning is now no longer tenable after the authoritative decision in *P. Philip's case* (Supra). This is plainly so because a revision petition is not expressly mentioned in Section 484(2)(a) either but it has been authoritatively held to be within the ambit of the word "application". It is common ground that the judgment in Mahanth Harihar Das's case (supra) was rendered prior to the later authoritative decision of their Lordships of the Supreme Court. The Division Bench in Mahatih Harihar Das's (supra) had referred to the definition of complaint under the new Code and took some sustenance from the fact that a complaint may be either written or oral. This, however, in my opinion, is in no way conclusive. With the greatest respect, therefore, I am of the view that the observation and conclusion in this context in Mahanth Harihar Das's case (supra) is contrary to the ratio in *P. Philip's case* (supra) and is, therefore, not good law. The same is hereby overruled.

19. To finally conclude, the answer to the question referred to the Full Bench, as quoted at the outset, is rendered in the affirmative and is held that the word

"application" in Clause (a) of Sub-section (2) of Section 484 of the Code of Criminal Procedure 1973 includes within its sweep a petition of complaint as well.

20. Though the referring Bench had specifically posed the question of law for determination by the Full Bench, it was agreed before us that in the light of the answer thereto this criminal miscellaneous petition be finally disposed of on merits as well. This is all the more so in view of the fact that the proceedings regretfully have arisen from an incident of 1968 and highlight the disastrous delays that sometimes may occur within the field of criminal justice as well.

21 We had consequently heard learned Counsel for the petitioner on merits as well. However, no meaningful argument could then be advanced once the question of law has been answered as above. It is undisputed that the proceedings at the very inception were earlier conducted in conformity with the old Code and in accordance with the aforesaid view the said Code would continue to apply to the same. Once that is so, u/s 202 of the old Code an enquiry could be directed to be made by a Magistrate and inevitably cognizance could be taken on the basis of such an enquiry. The procedure followed, therefore, would be in consonance with the statutory provision.

22. In the result, this criminal miscellaneous petition is without any merit and is hereby dismissed.