
(2013) 02 DEL CK 0401
In the Delhi High Court
Case No : CrI. M.C. 2011/2007

M.G. Attri

APPELLANT

Vs

S.K. Jain

RESPONDENT

Date of Decision : 26-02-2013

Acts Referred:

Citation : (2013) 3 AD 201 : (2013) 3 ILR Delhi 2176 : (2013) 2 JCC 831

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

G.P. Mittal, J.—By virtue of this Petition u/s 482 of the Code of Criminal Procedure ("the code"), the Petitioner M.G. Attri (Chief Enforcement Officer) seeks setting aside of the order dated 26.11.1998 passed by the learned Additional Chief Metropolitan Magistrate ("A.C.M.M.") in the Complaint Case No. 75/1/1996 instituted by the Petitioner against the Respondent and one Mohd. Ameerudeen for an offence punishable u/s 8(1) read with Section 14 of the Foreign Exchange Regulation Act, 1973 (the FERA) whereby on an Application u/s 245(2) of the Code, the Respondent was discharged on the ground that the complaint against him is groundless. By virtue of a Revision Petition u/s 397 of the Code, the Petitioner challenged the order dated 26.11.1998 before the learned Additional Sessions Judge ("the learned ASJ"). The Revision Petition came to be dismissed by the learned ASJ by an order dated 08.03.2007. The impugned orders are challenged on the following grounds:-

i) The Magistrate having taken cognizance issued the process on a complaint filed by the Petitioner. It was obligatory on the part of the learned A.C.M.M. to have first given an opportunity to the Petitioner to adduce its evidence as provided u/s 244 of the Code and only then to determine whether the Respondent is to be charged with the offence or he was liable to be discharged. Reliance is placed on Adalat Prasad Vs. Rooplal Jindal and Others, and Subramaniam Sethuraman Vs. State of Maharashtra and Another, .

ii) The learned A.C.M.M. acted in hot haste in holding that the charge against the Respondent was groundless. The Petitioner relied on some documents and the Criminal Complaints No. 28/1 and 63/1 filed against the Respondent apart from the evidence on record. The learned A.C.M.M. ought not to have discharged Respondent No. 2.

2. There is no dispute about the proposition of law that a Magistrate or for that matter an ASJ does not enjoy any inherent powers as those conferred on a High Court u/s 482 of the Code. Admittedly, the Magistrate and the "ASJ" do not have any power of review. In *Adalat Prasad*, a three Judge Bench of the Supreme Court held that against an order of summoning (in a summons case) the only remedy available, to an aggrieved accused, is the extraordinary remedy available u/s 482 of the Code and not by an Application to recall the summons or to seek discharge. The law laid down in *Adalat Prasad* was approved by a three Judge Bench decision in *Subramaniam Sethuraman*, and the contention raised that *Adalat Prasad* required reconsideration, was rejected. Para 14 of the report of the Supreme Court in *Subramaniam Sethuraman* is extracted hereunder:-

14. In *Adalat Prasad* case this Court considered the said view of the Court in *K.M. Mathew Vs. State of Kerala and another*, and held that the issuance of process u/s 204 is a preliminary step in the stage of trial contemplated in Chapter XX of the Code. Such an order made at a preliminary stage being an interlocutory order, same cannot be reviewed or reconsidered by the Magistrate, there being no provision under the Code for review of an order by the same court. Hence, it is impermissible for the Magistrate to reconsider his decision to issue process in the absence of any specific provision to recall such order. In that line of reasoning this Court in *Adalat Prasad* case held:

Therefore, we are of the opinion, that the view of this Court in *Mathew* case that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law.

3. The instant case, however, is not a summons trial case. Admittedly, it is a warrant trial as the offence with which Respondent No. 2 was being prosecuted was punishable with imprisonment which could extend to 7 years and also with fine. Although, the learned Senior Counsel for the Petitioner tried to convince this Court that since the complaint in this case was made by a public servant, the procedure would be that of a trial of warrant case instituted on a police report. I am, however, unable to subscribe to such interpretation in view of the fact that it is immaterial as to whether the complaint is made by a public servant or by a private individual.

4. In a warrant case, the procedure has to be as laid down under Sections 244 to 250 of the Code. The only distinction between the complaint made by a public servant and a private individual is as given in Section 200 of the Code whereby a Magistrate can dispense with the examination of a complainant if the complaint is made by a public servant acting or purporting to act in the discharge of his

official duties. That stage was already over, in view of the fact that process had already been ordered to be issued against the Respondent. In the scheme of the provision for trial of a warrant case instituted otherwise than on a police report Section 245(2) of the Code specifically empowers a Magistrate to discharge the accused at any previous stage of the case if, for reasons to be recorded, the Magistrate, considers the charge to be groundless.

5. In this connection a reference can be made to a report of the Supreme Court in *Ajoy Kumar Ghose Vs. State of Jharkhand and Another*, wherein the Supreme Court drew distinction between the provisions of Sections 244 and 245 of the Code and reiterated that the Magistrate is empowered to discharge an accused at any stage, that is, before evidence is recorded as provided u/s 244(1) of the Code, if the Magistrate finds the charge to be groundless. Paras 30, 31 and 36 of the report are reads as under:-

30. u/s 244, on the appearance of the accused, the Magistrate proceeds to hear the prosecution and take all such evidence, as may be produced in support of the prosecution. He may, at that stage, even issue summons to any of the witnesses on the application made by the prosecution. Thereafter comes the stage of Section 245(1) CrPC, where the Magistrate takes up the task of considering on all the evidence taken u/s 244(1) CrPC, and if he comes to the conclusion that no case against the accused has been made out, which, if unrebutted, would warrant the conviction of the accused, the Magistrate proceeds to discharge him.

31. The situation u/s 245(2) CrPC, however, is different, as has already been pointed out earlier. The Magistrate thereunder has the power to discharge the accused at any previous stage of the case. We have already shown earlier that that previous stage could be from Sections 200 to 204 CrPC and till the completion of the evidence of prosecution u/s 244 CrPC. Thus, the Magistrate can discharge the accused even when the accused appears, in pursuance of the summons or a warrant and even before the evidence is led u/s 244 CrPC, and makes an application for discharge.

36. The Magistrate has the power to discharge the accused u/s 245(2) CrPC at any previous stage i.e. before the evidence is recorded u/s 244(1) CrPC, which seems to be the established law, particularly in view of the decision in *Cricket Association of Bengal and Others Vs. State of West Bengal and Others*, as also the subsequent decision of the Bombay High Court in *Luis De Piedade Lobo Vs. Mahadev Vishwanath Parulekar and another*. The same decision was followed by Kerala High Court in *Manmohan Malhotra Vs. P.M. Abdul Salam and Another*, and Hon"ble Justice K.T. Thomas, as the learned Judge then was, accepted the proposition that the Magistrate has the power u/s 245(2) CrPC to discharge the accused at any previous stage. The Hon"ble Judge relied on a decision of the Madras High Court in *K. Abdul Salam Sahib Vs. Batchu Veerabhadraraju*, as also the judgment of the Himachal Pradesh High Court in *Gopal Chauhan Vs. Smt. Satya and Another*.

6. A perusal of the order dated 26.11.1998 passed by the learned A.C.M.M. reveals that the position of law that the Magistrate can discharge an accused in a warrant case instituted otherwise than on a police report was even conceded on behalf of the Petitioner as could be seen from the para 9 of the impugned order. In any case, in view of catena of judgments including Ajay Kumar Ghose, there cannot be any manner of doubt that the Magistrate is entitled to discharge the accused u/s 245(2) of the Code, if he finds the charge to be groundless.

7. The learned Senior Counsel for the Petitioner criticizes the finding reached by the learned A.C.M.M., which was approved by the learned ASJ on the ground that the statement made by the Respondent u/s 40 of the FERA, was admissible in evidence. The learned Senior Counsel states that the entry in the planner diary "5 Crores Amir Bhai" was established. This coupled with the statement dated 16.10.1995 given by the Respondent, his letter dated 04.12.1995 giving misleading explanation about the entry and the statement dated 23.01.2000 of the co-accused Mohd. Ameeruddin Habib would show that the charge against the Respondent could not be said to be groundless.

8. On the other hand, learned Senior Counsel for the Respondent submits that on the basis of this material, the Petitioner only speculated that the entry related to the sale of foreign exchange to Habib Bhai (accused No. 1 in the Complaint Case by the Respondent).

9. The learned A.C.M.M. dealt with the evidence relied upon by the Petitioner and observed that it was not capable of being converted into legal evidence and thus, held the charge against the Respondent groundless. Similarly, the learned ASJ opined that the case cannot be proceeded against the Respondent merely on suspicion.

10. The evidence relied upon by the Petitioner against the Respondent is the entry in the planner diary "5 Crores Amir Bhai". The second piece of evidence is the statement alleged to have been made by the Respondent. The same is extracted hereunder:-

Q. I put it to you that the entry at S. No. three (3) is actually "5 crores Amir Bhai". What you have to say about this.

Ans. No it is not true.

Q. Then to which transaction this entry of Rs. 5 crores pertain to?

Ans. I will try to recollect and let you know why I have written this. About entry at Sl. No. 4, I am not able to read anything at this moment.

11. The explanation with regard to the above stated question was given by the Respondent by his letter dated 04.12.1995 wherein the Respondent has tried to explain that this entry might be with regard to the re-conciliation of accounts between the Bhilai Engineering Corporation Limited and TPE pertaining to certain contracts as mentioned in the earlier said letter. The other piece of evidence

relied upon by the Petitioner is the statement of Mohd. Ameeruddin Habib, which was recorded on 23.01.2000 (much after filing of the complaint case). Even if, the statement is taken into consideration, it leads nowhere that the amount was related to some payments of foreign exchange by the Respondent to Mohd. Ameeruddin.

12. In the circumstances, I do not find any illegality committed by the learned A.C.M.M. in discharging the Respondent on the ground that the charge against him is groundless. The learned ASJ rightly declined to interfere with the order dated 26.11.1998 for good reasons.

13. The Petition is devoid of any merits; the same is accordingly dismissed. Pending applications also stand disposed of.