
(2002) 02 P&H CK 0117

In the Punjab And Haryana At Chandigarh

Case No : Criminal Miscellaneous No. 15658 of 1994

Mohinder Lal and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 12-02-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190, 192, 197, 197(1), 200
Evidence Act, 1872 — Section 3, 64, 65, 67
Penal Code, 1860 (IPC) — Section 447, 506

Citation : (2002) 3 CriminalCC 160

Hon'ble Judges : Prabhat Kumar Sinha, J

Bench : Single Bench

Advocate : Nivedita Nirvikar and Mr. Subodh Kumar, for the Appellant; Gajendra Kumar Jha and Mr. Binay Kumar, for the Opp. parties, Mr. Rudra Deo Kumar Sinha, APP, for the State, for the Respondent

Final Decision : Allowed

Judgement

Prabhat Kumar Sinha, J.—This is a petition filed by petitioners Mohinder Lal, then posted as Defence Estates Officer, incharge Bihar and Orissa Circle, Danapur Cantonment, Danapur and by Lt. Col. G.N. Jha, then posted as Commandant (Administrator) Bihar and Orissa, Danapur cantonment, u/s 482 of the Code of Criminal Procedure (hereinafter referred to as "the Code") praying there in the quash the entire proceeding in the Complaint Case No.296(C) of 1994 pending in the Court of Sub-divisional Judicial Magistrate, Danapur as also the order dated 5.9.1994 whereby and whereunder cognizance of offences under Sections 447 and 506 of the Indian Penal Code was taken against the petitioners and another.

2. The allegation in the complaint in brief, are that the petitioners and one other had tendered into the house and appertaining land belonging to the complaint and his brothers in which a tenant was living at the time of occurrence, thrice, lastly on 11.8.1994 and had threatened the tenants for vacating the premises, also abusing him.

3. In this case enquiry was held u/s 202 of the Code and by the impugned order dated 5.9.1994 the learned lower Court holding that a prima facie case was made out under Sections 447 and 506 of the Penal Code, took cognizance of the offence and directed for issuance of summons to the accused.

4. In the instant petition the petitioners besides claiming the allegations in the complaint to be false and fabricated in order to harass the officials, have also contended that they were Class-I Officers of the Government of India removable from service only on the orders from the Central Government, hence no cognizance of offence could have been taken against them without prior sanction of the Central Government as provided u/s 197 of the Code. It has been claimed that, about the house and premises in dispute, whatever steps were taken by the petitioners, were taken in course of due discharge of their official duties.

5. The complainant appeared and filed a counter affidavit countering the averments made in the petition.

6. This court has heard the learned counsels for the petitioners for the complainant and learned Additional Public Prosecutor at length. Besides claiming protection u/s 197 of the Code, arguments were also made on behalf of the petitioners to show that the evidence brought in course of enquiry did not make out any case under Sections 447 and 506 of the Penal Code whereas the learned counsel for the complainant, opposite party No.2, submitted that a prima facie case for commission of the aforesaid offences was so made out hence the order of summoning the accused to face the trial was valid and legal. It was also argued that since the acts alleged were committed by the petitioners not in course of their official duties, protection of Section 197 of the Code was not available to them. The learned Additional Public Prosecutor, in arguments, supported this view.

7. From a reading of the impugned order it will appear that after mentioning the case of the complainant learned lower Court stated about examination of two witnesses in course of enquiry and about filing of photostat copies of certain documents and, thereafter, expressed its satisfaction, on going through the evidence of the witnesses and on perusal of photostat copies of the documents so filed, that a case under Sections 447 and 506 of the Indian Penal Code was made out. Learned lower Court thereafter recorded order of taking of the cognizance and summoning the petitioners.

8. In course of hearing of the petition a question arose as to whether within the scheme of Section 202 of the Code the learned lower Court, apart from considering the evidence of witnesses could also have considered the documents of which photostat copies were filed, for arriving at the conclusion that the learned lower Court arrived at. This court, apart from the aforesaid point will also consider as to whether at this stage the petitioners could be allowed to bring on record documents to reinforce their claim that being public servants removable only on the orders of the Central Government, protection of Section 197 of the

Code was available to them in the circumstances of the case.

9. From the impugned order it is clear that the learned lower Court has also considered and relied upon the photostat copies of the documents filed by the complainant in course of enquiry for passing the impugned order.

10. Section 202 of the Code is reproduced below-

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 u/s 192, may, if he thinks fit, 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 directing 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 u/s 200.

(2) In a inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses 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....".

11. Chapter XV of the Code relates to the complaints to Magistrates, Section 200 of the Code contemplates that 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. Therefore, of the statement of the complainant and of the witnesses, if present on the date the complainant is examined on oath, only the substance of such examination is to be reduced in writing. u/s 204 of the Code if in the opinion of a Magistrate taking cognizance of offence there is sufficient ground for proceeding, he may issue summons or warrant, as the case may be. This the Magistrate can do just after examining the complainant on oath, and after also examining the witnesses present, if any, if in his opinion there is sufficient ground for proceeding. However, the Magistrate on receipt of a complaint of which he is authorised to take cognizance, or which has been made over to him, may

postpone the issue of process against the accused and may conduct enquiry himself. Under sub-section (2) of Section 202 of the Code, in an enquiry under sub-section (1) the Magistrate may, if he thinks fit, take evidence of witnesses on oath. Though in this provision the word "may" has been used but intention is obvious that if the Magistrate thinks fit to call upon the complainant to produce his witnesses, he shall take evidence of witnesses on oath as no other mode of recording the statement of witnesses in course of enquiry has been provided.

12. This provision is distinct from provision u/s 200 of the Code in which the Magistrate is required only reduce in writing the substance of such examination. But specific use of expression "take evidence of witnesses" under sub-section (2) of Section 200 of the Code is significant. If the Magistrate is satisfied, on examining upon oath the complainant and witnesses u/s 200 of the Code, that there are sufficient grounds for proceeding, he can issue process u/s 204 of the Code. But if the Magistrate is not so satisfied, the alternative is to conduct an enquiry into the case himself or to direct and investigation to be made u/s 202 of the Code. It is in this context that I find that the Legislature has provided that in an enquiry the Magistrate will record the evidence" of witnesses on oath. This does not say just about examining the witnesses or reducing in writing only the substance of such examination.

13. It, therefore, follows that where Magistrate decides to conduct an enquiry under in course of enquiry would be the evidence of witnesses.

14. Evidence has been defined u/s 3 of the Indian Evidence Act, 1872 ("the Act", in short) which is as follows:

"Evidence-Evidence means and includes-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence.

(2) all documents produced for the inspection of the Court: such documents are called documentary evidence.

However, all such oral or documentary evidence are to be brought on the record strictly in accordance with the provisions of the Act. That, otherwise, cannot be considered as evidence.

15. Pausing for a moment here, it may be noted that a Magistrate can take cognizance of offence upon receiving a complaint of facts which constitute such offence; upon a police report of such facts: or upon information received from any person other than a Police Officer, or upon his own knowledge that such offence has been committed, as provided u/s 190 of the Code. In a vast majority of cases, barring a few exceptions, cognizance of offence is taken either upon a police report of such facts or upon receiving such a complaint. When a case is brought before the Magistrate for taking cognizance of offence is taken either upon a police report, the Magistrate has the benefit of going through the case

diary containing the result of the investigation made by a police officer as also the opinion of superior police officers on the facts gathered during the investigation. The scope of investigation into an allegation of commission of a crime by Police is a much larger than is in an enquiry conducted by a Magistrate. In the former the police can follow clues and unearth additional facts by going through documents and by recording statements of relevant witnesses. But what generally happens when a complaint goes to enquiry is that the complainant is asked to produce witnesses and it is for the complainant to decide which witness or witnesses he would produce as also the number of witnesses. In a number of cases it may be found that a complainant has examined a witness or two, calling upon the court to decide whether the materials are sufficient to issue process. Those witnesses give *exparte* evidence. It is usual, if the allegations of the complainant are supported by one or two witnesses, for the Magistrate to take a decision in favour of issuance of process. In a complaint the complainant is not obliged to place all the facts before the court, rather has liberty to confine it only to such facts which may serve his purpose. If the Magistrate orders for an investigation u/s 202 of the Code by a Police Officer, or by a person not a police officer who will then have all the powers conferred upon an officer-in-charge of a police station (sub-section 3 to Section 202 of the Code), the scope of such investigation, in practical terms, would again be larger than an enquiry conducted by the Magistrate himself, it is, therefore, more necessary to construe the provisions of law, relating to the issuance of process upon a complaint, strictly, so as to avoid any miscarriage of justice,

16. In so far as documentary evidence is concerned, public documents can be brought on record and treated as evidence without formal proof but other documents are to be brought on record in accordance with the provisions of the Act. Learned counsels of both the sides have submitted that they could not find any decision on this point but in that context learned counsel for opposite party No.2 pointed out provision u/s 294 of the Code and argued that certain documents under certain circumstances can be read in evidence in any enquiry, trial or other proceedings without proof of the signature of the person by whom it purports to be signed. Obviously that provision is not applicable in an enquiry conducted u/s 202 of the Code as, under that provision, on filing of documents the other side is to be called upon to admit or deny the genuineness of such documents and those can be read in evidence only if the genuineness of such documents is not disputed. An enquiry u/s 202 of the Code is conducted *exparte*, hence there is no question of calling upon the other side or its pleader to admit or deny the genuineness of the documents. However, there are cases where documents can be read in evidence in enquiry or trial or in other proceeding such as the one provided u/s 296 of the Code as per which the evidence of any person, whose evidence is of a formal character may be given by affidavit and may be read in evidence in any enquiry, trial or other proceeding under the Code. But evidence can be given that way only under express provision of law. Though sub-section (2) of Section 202 of the Code speaks of taking of the

evidence of witnesses on oath, that provision will apply to the documentary evidence also since, apart from public documents, other documents are to be brought in evidence after having been duly proved by formal evidence. There can hardly be two sets or provisions for bringing on record the oral evidence, and the documentary evidence u/s 202 of the Code. In view of the aforesaid discussion I come to the conclusion that when an enquiry is conducted under sub-section (1) of Section 202 of the Code and if the Magistrate examines witnesses of the complainant, he is required to consider, for the purposes of taking recourse to either Sections 203 or 204 of the Code, such oral statements and documents which have been brought on the record as evidence in accordance with the provisions of the Act.

17. Now coming to the case in hand, from the lower Court record it will appear that, with a list of documents, the complainant had filed eight sets of documents which included, besides photostat copies of the certified copies of certain public documents, also a sale deed executed by one Dr. Abdul Shakoor. In so far as the photostat copy of the sale deed is concerned, if that was sought to be brought on the record, the writing and signatures of the sale deed were required to have been proved to be the writing and signature of such person/persons who purported to have written, or signed upon, the document, under the provision of Section 67 of the Act. u/s 64 of the Act the documents have to be proved by primary evidence subject to certain exceptions. Section 65 of the Act speaks as to which of the documents may be given in evidence as secondary evidence. Clause (0 provides that when the original is a document of which certified copy is permitted by this Act, or by any other law in force in India, secondary evidence of that document may be given but this also provides that in such a case only a certified copy of the document, but no other kind of secondary evidence, is admissible. This rules out the photostat copy of a certified copy of a document.

Therefore, I find that the learned lower Court has considered such documents which have not been brought on the record in accordance with the provisions of the Act. To that extent the impugned order is not legal, nor maintainable.

18. Coming to the second question that has arisen in this context, that whether at the stage of enquiry u/s 202 of the Code the accused can be permitted to bring on record documents which do not need formal proof, to show that the accused, in the circumstances of the case, is entitled to the protection of Section 197 of the Code, being a public servant and the alleged offence having been committed while acting or purporting to act in discharge of his official duties.

19. No doubt, in course of enquiry u/s 202 of the Code a person sought to be prosecuted has no locus standi it is legal for him to appear in the case at that stage in person or through an advocate and to watch the proceedings.

20. It is now well established that once prosecution commences, it is legal for the accused to raise the question of sanction u/s 197 of the Code at any stage of the proceeding. In this regard the Apex Court in the case of Suresh Kumar

Bhikamchand Jain Vs. Pandey Ajay Bhushan and Others, , have dealt with the question as to at which stage the accused may be permitted to raise the plea of want of sanction u/s 197 of the Code. Some observations of their Lordships of the Supreme Court are reproduced below:

"The legislative mandate engrafted in sub-section (1) of Section 197 debarring a court from taking cognizance of an offence except with a previous sanction of the Government concerned in a case where the acts complained of are alleged to have been committed by a public servant in discharge of his official duty or purporting to be in discharge of his official duty and such public servant is not removable from his office save by or with the sanction of the Government touches the jurisdiction of the court itself. It is a prohibition imposed by the statute from taking cognizance, the accused after appearing before the Court on process being issued, by an application indicating that Section 197(1) is attracted merely assists the court to rectify its error where jurisdiction has been exercised which it does not possess. In such a case there should not be any bar for the accused producing the relevant documents and materials which will be ipso facto admissible, for adjudication of the question as to whether in fact Section 197 has any application in the case in hand. It is no longer in dispute and has been indicated by this Court in several cases that the question of sanction can be considered at any stage of the proceedings."

And "This being the position it would be unreasonable to hold that the accused even though might have really acted in discharge of his official duty for which the complaints have been lodged yet he will have to wait till the stage under sub-section (4), Section 246 of the Code is reached or at least till he will be able to bring in relevant -materials while cross-examining the prosecution witnesses. On the other hand it would be logical to hold that the matter being one dealing with the jurisdiction of the court to take cognizance, the accused would be entitled to produce the relevant and material documents which can be a limited into evidence without formal proof, for the limited consideration of the court whether the necessary ingredients to attract Section 197 of the Code have been established or not. The question of applicability of Section 197 of the Code and the consequential ouster of jurisdiction of the court to take cognizance without a valid sanction (sic) genetically different from the plea of the accused that the averments in the complaint do not make out an offence and as such the order of the cognizance and/or the criminal proceedings be quashed."

21. The aforesaid case had come up for consideration before the Aurangabad Bench of Bombay High Court and then before the Supreme Court after the lower Court had issued process against three of the accused.

Relevant portion of Section 197 of the Code is reproduced below:

"197. Prosecution of Judges and public servants.-(I) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to

have been committed by him while acting or purporting to act in the discharge of his official duty. no court shall take cognizance of such offence except with the previous sanction-

(a) in the case of a person who is employed or, as the case may be was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, or the Central Government.

(b) in the case of person who is employed or, as the case may be was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government....."

22. This provision indicates that if the materials are on record showing that the petitioner was entitled to the protection u/s 197 of the Code, then the court shall stay its hands and shall not take cognizance of offence except with the previous sanction of the appropriate Government. Therefore, this provision also envisages that materials in this regard could be brought on the record before cognizance is taken. In a Police case the accused has an opportunity to place plea of protection under this provision at the time the court is contemplating taking cognizance of offence on a police challan. In many of such cases accused persons appear before the court even during the investigation of the case by Police and seek bail. Since they are already present, they have an opportunity to plead before the court, before taking of cognizance, to also consider their plea of protection u/s 197 of the Code. There may be cases in which either such plea has not been taken before cognizance or materials to show that the accused was entitled to such protection are wanting in which case also, after cognizance is taken, the accused can take up this defence at any stage of the proceeding by filing such documents which could be considered without their formal proof and then the court is to decide that question first before proceeding with the case. However, there might be cases in which such plea cannot be decided at the earlier stage of the proceedings if that plea requires to be proved by adducing further evidence in which case the matter may be considered subsequently, even at the time of pronouncing the judgment. In any case, the accused has a right to raise this plea at any stage of the proceeding.

23. However, in a complaint case, which has gone for enquiry u/s 202 of the Code, that provision does not provide for hearing the accused in his defence. But this specific defence of sanction by appropriate Government, which has been provided by law in order to spare a public servant from vexatious litigation, cuts at the very root of the jurisdiction of the court to take cognizance of offence if it could be shown that the accused was entitled to such protection. In a complaint case technically cognizance is taken at the time the Magistrate applies his mind to the facts of the case in order to decide whether or not the case required any further action including an enquiry or investigation into the complaint. Therefore, at that stage it may or may not be possible for an accused to make appearance and take this plea. But, when the case has come for enquiry, the accused who has a right to make appearance in the case in person or through a counsel,

should have this opportunity to raise this defence at least before the court decides whether or not to issue process against the accused. Though Section 202 does not provide this, but when this provision is read with Section 197 of the Code, and since this protection relates to the jurisdiction of the Court to make cognizance of the offence. I see no reason as to why at that stage the accused should be denied this opportunity and be asked to wait till process has been issued against him and then to make a prayer and take this plea. No doubt, in course of enquiry the accused cannot take; any other plea such as relating to the facts and the allegations as made out in the complaint, nor can he cross-examine any witness of the complainant produced in course of enquiry but in so far as this specific plea is concerned, in view of the discussion as above, in my opinion the accused in course of enquiry, and before order has been passed about issuance of process, can raise this plea before the court by filing such documents which could be looked into as evidence without their formal proof. However, in case the Magistrate finds it not possible to decide this question only on perusal of such documents so produced and that further evidence is required to take a decision in that context then, by recording his order in writing, he can proceed to decide as to whether or not to issue process against accused and can pass an order in that regard. In such a case the matter will remain open to be decided in course of trial, even at the stage of judgment.

24. In view of aforesaid, this petition is allowed and the impugned order dated 5.9.1994 is quashed. The matter is remitted back to the learned lower Court for a fresh order on the point, only on consideration of the evidence that has been brought on the record. If the petitioners appear before the lower Court at this stage and raise the plea of protection u/s 197 of the Code and if they file such documents which could be looked into as evidence without formal proof, then the learned Magistrate, after hearing the parties, will consider that question and pass an order in accordance with law as indicated in this order.