

(1997) 06 KAR CK 0048
In the Karnataka High Court
Case No : Criminal P. No. 1132 of 1997

M/s Visva Cement Products

APPELLANT

Vs

Karnataka State Financial Corporation, Gadag

RESPONDENT

Date of Decision : 20-06-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 204 (2), 311, 465, 482
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (1998) 1 ALT(Cri) 176 : (1998) 1 CivCC 40 : (1997) CriLJ 4598 :
(1997) 4 KarLJ 23 : (1998) 1 RCR(Criminal) 593

Hon'ble Judges : M.P. Chinnappa, J

Bench : Single Bench

Advocate : V.T. Raya Reddy, for the Appellant; B. Rudragowda, for the Respondent

Judgement

1. In this petition the petitioner has challenged the order of taking cognizance on 3 grounds, viz. (a) the learned Magistrate has not taken cognizance of the offence before recording the sworn statement; (b) that the list of witnesses was not furnished to the accused along with the summons; and (c) that the firm has not been arraigned as an accused.

2. As far as the 1st contention of the petitioner that the Magistrate has not taken cognizance but proceeded to record the sworn statement and hence it is illegal, is unsustainable in view of the decisions rendered by their Lordships in Anil Saran Vs. State of Bihar and another, : Nirmaljit Singh Hoon Vs. The State of West Bengal and Another, : Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others, and V. N. Samant Vs. K.G.N. Traders and another, . Wherein it is held that cognizance is deemed to have been taken when the Magistrate applied his judicial mind for proceeding under S. 200 and this position has been explained in the decisions referred to above. In this case, the Magistrate has recorded the sworn statement of the witnesses and after being satisfied he had directed to issue process to the accused persons. Under these circumstances I have no hesitation to hold that the Magistrate has taken

cognizance in this case. Accordingly, the argument on this point is rejected.

3. The learned Counsel for the petitioner further submitted that S. 204(2), Cr. P.C. is mandatory that the list of witnesses should accompany the summons and in support of his argument, he placed reliance on a decision rendered by this Court reported in Keshava Murthy Vs. Veeraiah, , wherein this Court has come to the conclusion that S. 204(2) has been enacted in the interest and for the protection of the accused. Its disregard is likely to injuriously affect the accused. Its disregard is likely to injuriously affect the accused in the conduct of his defence on merits. Having regard to the preemptory negative language employed in S. 204(2) of the code, the policy apparently underlying it, the object the provision intend to achieve and the mischief it intends to avoid, it can be held that S. 204(2) is mandatory in nature. It is well settled that contravention of mandatory provision will carry invalidating consequences S. 204(2) of the Code is mandatory in nature commanding absolute compliance. However, in that case, this Court has passed the order, the operative portion of which reads as follows :

"The next question is what order is now called for. The breach of law can be corrected without prejudice to the case of the petitioner No. 1 and petitioner No. 2 and without injury to the just disposal of the case. I feel on the facts and in the circumstances of the case, the just and proper circumstances of the case, the just and proper order would be to send back the matter to the Metropolitan Magistrate, IV Court, Bangalore for further proceedings in the case in accordance with law. He shall continue the proceedings from the stage at which he directed the summonses to the petitioners, by issuing fresh summonses to the petitioners in accordance with the provisions contained in section 204 of the Code. The Magistrate shall ensure that the respondent furnishes the list of witnesses if he has any witnesses to examine or makes a statement if he is the only witness in the case, to that effect."

Subsequently this Court in Ramaiah v. Lakshmana Gowda ILR 1995 Kar 2667 has held that in view of S. 204(2) Cr. P.C. the learned Magistrate cannot issue summons or process to the accused unless a list is filed along with the complaint. From the above decisions it is clear that the accused unless a list is filed along with the complaint. From the above decisions it is clear that the compliance of S. 204(2) is a mandatory requirement of law. In that context it is now necessary to refer to sub-section (2) of S. 204 Cr. P.C. which reads :

"No summons or warrant shall be issued against the accused under sub-section (i) until a list or the prosecution witnesses has been filed."

4. So issuing of summons is the duty of the Court having come to the conclusion that there is prima facie case to proceed against the accused persons. Such being the case, if the list of witnesses is not furnished by the complainant, it is the duty of the Court to insist upon the complainant to produce the list of witnesses or make a statement that the complainant himself is to be examined in

the case. It may also be mentioned here that taking cognizance recording the sworn statement of complainant and witnesses and thereafter to pass order. etc. etc. is one stage of the proceedings and the list of witnesses is not necessary at this stage. These procedures will come under Chapter XIV and XV. As far as commencing of proceedings before the Magistrate, i.e. issue of process, etc. come under Chapter XVI of the Cr. P.C. This is a separate step to be followed by the Magistrate.

5. Further, it may also be recalled that their Lordships of the Supreme Court in a decision reported in *Mowu Vs. The Superintendent, Special Jail, Nowgong, Assam and Others*, . *Nowgong, Assam* have held that S. 204(1-A) requires that a Magistrate shall not issue process until a list of the prosecution witnesses has been filed before him. This provision is intended to be a safeguard for an accused person so that he knows before hand what evidence is likely to be produced against him. It is further held that the produced against him. It is further held that the complaint and the First Information Report would disclose the evidence which would be relied upon by the prosecution, although a list of witnesses might not have been filed before the Magistrate. Though it is held by their Lordships that it is mandatory, they have mellowed down the same as only directory.

6. In this case also, the complaint filed by the petitioner is in regard to the cheque issued by the petitioner and in that connection, notice was served on the petitioner informing that the cheque when presented was dishonoured by the Bank. Therefore, a from a reading of the complaint and also the summons issued by the Court, it would be clear for the petitioner to know what evidence the complainant would adduce in the case. Further, even if the list of witnesses is furnished, if the complainant or the prosecution desires to examine any other witness not cited in the list of witnesses, they can be permitted by the court to examine them under S. 311 Cr. P.C. S. 311 Cr. P.C. reads :

"Any Court may, at any stage of any inquiry, trial or other proceedings under this Code, summons any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine, any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

It is not the case, that the complainant cannot examine any other witness except the witness mentioned in the list of witnesses to make it that if the entire list of witnesses is not furnished, the proceedings will become infructuous. If that is so, the very purpose of S. 311 Cr. P.C. becomes redundant. Therefore, though the wording of the section is mandatory, it is only in the nature of directory and non-furnishing of list of witnesses is only an irregularity which can be cured under S. 465, Cr. P.C. as could be made out from the decision of the Apex Court *Mowu Vs. The Superintendent, Special Jail, Nowgong, Assam and Others*, .

7. Even accepting for the sake of argument that this a mandatory provision of

law, even then the non-compliance of it would not in any way invalidate the entire proceedings. Besides that, as observed by their Lordships of the Supreme Court in a decision reported in *State of Himachal Pradesh Vs. Shri Pirthi Chand* and another, the non-compliance of mandatory provisions of law also is not a ground for the High Court under S. 482, Cr. P.C. to interfere with the order passed by the trial Court.

8. The only grievance that the accused can have is that because the list of witnesses is not furnished, he would not have sufficient time to set up his defence and thereby prejudice will be caused. On the other hand, if he approaches the same Court for directing the complainant to furnish the list of witnesses, the Court can as well furnish the list of witnesses and grant reasonable time to the accused persons to conduct their defence effectively. It is common knowledge and it is well established that trial will not commence enquiry or trial as soon as the accused persons appeared before the Court. On the other hand, sufficient time could be given to the accused after furnishing copy of the charge sheet and other particulars whatever necessary for him. Even in police case also, the copies of the charge sheet will be furnished to him as soon as he appeared before the Court. But only in a private complaint, the copy of the complaint and list of witnesses would be sent to the accused persons.

9. With this background, it is now necessary to find out the consequences of non-furnishing of list of witnesses. As noticed above in both the decisions, this Court has set aside the order of issuance of process, but not taking of cognizance and other proceedings and directed the Court to furnish list of witnesses. This is only an inconsequential relief. On the other hand, without setting aside the order of issuing process, the trial Court itself can rectify the defect when the accused appeared before it in response to the summons or warrant, as the case may be. Such being the case, it is not a ground for this Court to interfere with the order passed by the Magistrate, under S. 482, Cr. P.C. It is further made clear that necessary and expedient remedy is available to the accused before the trial Court itself. When effective and speedy remedy is available, it is well established that the High Court cannot interfere with the order by invoking the inherent jurisdiction of the Court. If the list of witnesses is not furnished it is always open to the accused to approach the trial Court and insist for the list of witnesses. The interference by this Court and setting aside the order only on this ground is nothing but waste of time and empty formality, as the defect can be remedied without prejudice to the accused. Notwithstanding these facts, it is made clear that the finding of this Court does not absolve the responsibility of the Magistrate to insist upon the complainant to furnish the list of witnesses before issuing summons or warrant as the case may be as contemplated under sub-section (2) of S. 204 of Cr. P.C. For the foregoing reasons, I have not been persuaded by the argument that non-furnishing of list of witnesses along with summons warrants this Court to set aside the order.

10. The learned Counsel for the petitioner further submitted that the firm has not

been arrayed as an accused. Therefore, the complaint is liable to be rejected. This argument is unsustainable. From a perusal of the complaint it is seen that M/s. Visva Cement Products the partnership firm is arrayed as a party represented by its partner Venkatesh Takaram Vernekar. This shows that the firm is made an accused in this case and the said firm is represented by its partners. The said partner only had executed all necessary documents. The cheque also was signed on behalf of the partnership firm. Hence, this argument is rejected. For the foregoing reasons, I hold that this petition has no merit and is liable to be dismissed. It is also well settled law that when the offence is committed by a company, either the company alone or the person in charge of the business of the company alone, or both of them together can be prosecuted for the offence punishable under S. 138 of the N.I. Act.

11. Accordingly this petition is dismissed with a direction to the Magistrate to furnish list of witnesses and also reasonable time to the petitioner to set up his defence in the case. Further, the Magistrate shall comply with sub-section (2) of S. 204 Cr. P.C. scrupulously in future, lest the matter will be viewed seriously.

12. Petition dismissed.