

(2015) 10 AHC CK 0146

In the Allahabad High Court

Case No : Criminal Misc. Application No. 44142 of 2014

Nisha Sharma and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 09-10-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 200, 202, 203, 204
Penal Code, 1860 (IPC) — Section 323, 384, 504, 506

Citation : (2015) 10 ADJ 19 : (2016) 92 ALLCC 364

Hon'ble Judges : Pramod Kumar Srivastava, J.

Bench : Single Bench

Advocate : Anil Kumar Bajpai, for the Appellant; Manvendra Nath Singh and Neeraj Tiwari, for the Respondent

Final Decision : Allowed

Judgement

Pramod Kumar Srivastava, J.—This application under Section 482 Cr.P.C. has been filed for quashing the summoning order dated 13.8.2014 passed in complaint case No. 974 of 2014 (Rajiv Kumar Singh v. Kumari Nisha Sharma and another) under Section 323 , 504 , 506 and 384 I.P.C., P.S.-Kalyanpur, district Kanpur Nagar pending in the Court of Metropolitan Magistrate, Court No. 6, Kanpur Nagar; and the proceedings of the said case. Heard learned counsel for the applicants, Sri Neeraj Tiwari learned counsel for the OP No. 3 University and learned AGA for OP No. 1 State. None appeared on behalf of the OP No. - 2 (complainant Rajiv Kumar Singh).

2. The complainant Rajiv Kumar Singh moved application under Section 156(3) Cr.P.C. in the Court below with the averments that he has been studying B-Pharma in pharmacy department of Chhatrapati Sahuji Maharaj Kanpur Mahavidhyalaya. On 23.4.2014, he was appearing in the examination of said course in University. During said examination at about 12:45 p.m. in noon, accused Nisha Sharma and Ajay Kumar Yadav, who are the lecturers of the Pharmacy department of said University, had deliberately tagged two chits with

the answer-sheet of the complainant. When complainant opposed this act, then both the accused had abused him and beaten him in the examination hall and threatened that they will not let him pass the examination and ruin his future. Thereafter both the accused had expelled him from the examination hall in front of the students present there.

3. The application of the complainant under Section 156(3) Cr.P.C. was registered as complaint. The complainant had examined himself under Section 200 Cr.P.C. and also examined two witnesses PW-1 Manish Kumar Singh and PW-2 Amajeet Kumar under Section 202 Cr.P.C. Thereafter, the Court below had passed the order dated 13.8.2014 by which, both the accused Nisha Sharma and Ajay Kumar Yadav (present applicants) were summoned for the offences under Section 323 , 504 , 506 and 384 I.P.C. Thereafter, the applicants had moved present petition under Section 482 Cr.P.C. for quashing the aforesaid summoning order dated 13.8.2014 and the proceedings of the concerned complaint case No. 974/2014.

4. The applicants' case in brief is that the complainant Rajiv Kumar Singh was caught red handed using unfair means by applicant No. - 2 during examination of question paper of Pharmaceuticals Chemistry at 12:20 p.m. on 23.4.2014 and certain hand written material was recovered from his possession, which was related to the subject. At that time, applicant No. -1 Nisha Sharma, being Associate Professor as well as Head of Department of Pharmacy, was also present there. After catching red handed the complainant (present OP No. -2) for use of unfair means, she had filled up the related form concerning use of unfair means as per rules of University, on which complainant had put on his signature and disclosed therein that he was using chit for assistance in examination. Thereafter, this material was placed before the Examination Committee, which had considered entire materials and cancelled but further permitted him to appear in examination of next year of 2015. The said decision of Examination Committee was communicated by Assistant Registrar (Confidential) of University to OP No. -2 vide letter dated 20.9.2014. (A-copy of which is Annexure-6 to this application). After that OP No. -2/complainant had not challenged the decision of the University canceling his result. But he filed the complaint case in Court below due to mala fide, which is nothing but abuse of process of the Court. Therefore, summoning order dated 13.8.2014 passed in said case as well as proceedings of said complaint case are challenged for being quashed through present application under Section 482 Cr.P.C.

5. Notice of this application was served on opposite parties. Learned AGA appeared for OP No. -1 State. Counsel for OP No. -3 University also appeared before the Court and supported the case of the applicants. But none appeared on behalf of OP No. -2 Rajiv Kumar Singh inspite of service of notice. Therefore, the affidavit supported this application on behalf of the applicants remained uncontroverted.

6. It is uncontroverted and proved fact, from a perusal of available documents

and evidences, are that after the applicants Kumari Nisha Sharma and Ajay Kumar Yadav, the teachers of University (OP No. -3) had caught the complainant OP No. -2 Rajiv Kumar Singh red handed with copying slips in examination and reported the matter to the University, the examination of the complainant for that year was cancelled by the University after enquiry. In said enquiry the complainant was afforded opportunity of hearing. The order of cancellation of examination of complainant became final. Then no FIR was lodged by the complainant/OP No. -2 immediately, who moved application under Section 156(3) Cr.P.C. (which was later on converted into complaint case). In said case instituted by complainant/OP No. -2, summoning order was passed by the learned Magistrate on 13.8.2014. It is pertinent to mention that alleged incident occurred in examination hall when examination was going on. This argument of the University for the applicants cannot be discarded that during the period of examination, no one is permitted to enter in examination hall if he is not directly connected with the examination. But none of the person directly connected with the said examination, for example, any students appearing in examination or employee or teacher of the University, was examined by the complainant under Section 202 Cr.P.C. in support of his averments. The two witnesses examined by him under Section 202 Cr.P.C. are outsiders to the said examination. PW-1 Manish Kumar Singh is the real brother of the complainant and PW-2 Amarjeet Kumar is a friend of the Manish Kumar Singh. These outsiders are not expected to be present in examination hall during the period of examination, and that too without any sufficient reason. This contention of learned counsel for the applicants is not unacceptable that their (PW-1 and PW-2) presence in examination hall is unbelievable in above circumstances, especially in absence of any counter-affidavit and in present case of uncontroverted affidavit.

7. In ruling "M/s. Pepsi Food Ltd. and another v. Special Judicial Magistrate and others, 1998 U.P. Cr.R. 118" Hon"ble Supreme Court held:

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning the accused. Magistrate had to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

8. In Paul George Vs. State, Hon"ble Supreme Court held:

"We feel that whatever be the outcome of the pleas raised by the appellant on merit, the order disposing of the matter must indicate application of mind to the case and some reasons be assigned for negating or accepting such pleas.----- It is true that it may depend upon the nature of the matter which is being dealt with by the Court and the nature of the jurisdiction being exercised as to in what manner the reasons may be recorded e.g. in an order of affirmance detailed reasons or discussion may not be necessary but some brief indication by the application of mind may be traceable to affirm an order would certainly be required. Mere ritual of repeating the words or language used in the provisions, saying that no illegality, impropriety or jurisdictional error is found in the judgment under challenge without even a whisper of the merits of the matter or nature of pleas raised does not meet the requirement of decision of a case judicially."

9. In *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another*, , the Apex Court had held:

"Section 203 of the Code empowers a Magistrate to dismiss a complaint without even issuing a process. It uses the words "after considering" and "the Magistrate is of opinion that there is no sufficient ground for proceeding". These words suggest that the Magistrate has to apply his mind to a complaint at the initial stage itself and see whether a case is made out against the accused persons before issuing process to them on the basis of the complaint. For applying his mind and forming an opinion as to whether there is sufficient ground for proceeding, a complaint must make out a prima facie case to proceed. This, in other words, means that a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If this were not the requirement, consequences could be far-reaching. If a Magistrate had to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process is issued would be tremendous. Even Section 204 of the Code starts with the words "if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding". The words "sufficient ground for proceeding" again suggest that ground should be made out in the complaint for proceeding against the respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed."

10. It is settled principle that while summoning an accused, the Court has to see prima facie evidence. The "prima facie evidence" means the evidence sufficient for summoning the accused and not the evidence sufficient to warrant conviction. The enquiry under Section 202 Cr.P.C. is limited only to ascertain of truth or falsehood of allegations made in the complaint and whether on the material placed by the complainant a prima facie case was made out for summoning the accused or not.

11. As held by the Courts as above, the passing of order of summoning any person as accused is a very important matter, which initiates criminal proceeding against him. Such orders cannot be passed summarily or without applying judicial mind. In light of this legal position I have gone through the impugned order. A perusal of this order indicates that after noting the names of witnesses Magistrate mentioned that there is sufficient prima facie evidence against the two accused persons for summoning them under Sections 323 , 504 , 506 and 384 I.P.C. Neither any discussion of evidence was made, nor was it considered as to which accused had allegedly committed what overt act. The two accused persons of complaint were summoned for offences mentioned in it. I doubt whether the learned Magistrate had actually read statements under Sections 200 , 202 Cr.P.C. or the documents of the original file or not. No reason was mentioned in the impugned order as to what those documents contain, and how they help the prosecution case. Impugned order clearly lacks the reflection of application of judicial discretion or mind. Nothing is there which may show that learned Magistrate, before passing of the order under challenge had considered facts of the case and evidence or law. Therefore it appears that, in fact, no judicial mind was applied before the passing of impugned order of summoning. Such order cannot be accepted as a proper legal judicial order passed after following due procedure of law. Therefore it is liable to be quashed.

12. In Anita Malhotra Vs. Apparel Export Promotion Council and Another, , the Apex Court had held as under:

"20. As rightly stated so, though it is not proper for the High Court to consider the defence of the accused or conduct a roving enquiry in respect of merits of the accusation, but if on the face of the document which is beyond suspicion or doubt, placed by the accused and if it is considered that the accusation against her cannot stand, in such a matter, in order to prevent injustice or abuse of process, it is incumbent on the High Court to look into those document/ documents which have a bearing on the matter even at the initial stage and grant relief to the person concerned by exercising jurisdiction under Section 482 of the Code."

13. In the light of abovementioned factual, legal position and unconverted facts mentioned in affidavit of applicants, it appears that during examination of Kanpur University the complainant (OP No. -2) had been caught red handed while copying in examination by using unfair means; then applicants had sealed his copy and reported this matter to the University. Thereafter University had conducted a formal enquiry in accordance with rules and then cancelled the examination of OP No. -2/complainant for the year 2013-2014. The said decision of the University became final. Aggrieved from this, the OP No. -2 complainant had filed criminal complaint against the applicants with the help of his real brother and his friend, who deposed regarding their alleged presence in examination hall, which was in fact not possible during examination period. It is also explicitly clear from the discussion of facts and impugned summoning order

as above, that said summoning order had been passed by the magistrate concerned without application of mind and without following due procedure of law. This matter is not a private dispute but it may have far reaching effects and consequences. If the invigilators or person conducting examination carrying on their duty of stopping the students/examinees who use unfair means are subjected to protracted long criminal prosecution, then such teachers may either refuse to cooperate in conducting of fair examination or may refrain from stopping such illegal activities for protecting them from unwarranted inconvenience. This may hamper the purity of the examination and may indirectly have adverse effect on society. Therefore the present case is such a matter in which Court must exercise its inherent powers to protect the teachers and officials cooperation in fair examination at higher level.

14. For the reasons discussed above, the impugned summoning order of the Court below is defective and liable to be set aside. Since the possibility of conviction of applicants is bleak and continuation of criminal case would put the accused to great oppression and prejudice, and extreme injustice would be caused to them by not quashing the criminal. Therefore it would be unfair and contrary to interest of justice to continue the criminal proceeding and direct the applicants to go through protracted procedure of trial. Therefore the continuation of criminal proceeding in this case would tantamount to abuse of process of law.

15. Therefore, by exercising inherent jurisdiction of this Court and for preventing abuse of process of Court, this application under Section 482 Cr.P.C. is allowed. The proceedings of complaint case No. 974 of 2014 (Rajiv Kumar Singh v. Nisha Sharma and another) under Section 323 , 504 , 506 and 384 I.P.C., P.S. Kalyanpur, District Kanpur Nagar pending in the Court of Metropolitan Magistrate, Court No. 6 are hereby quashed. Let a copy of this order was sent to the trial Court concerned immediately for ensuring compliance.