
(2018) 05 CAL CK 0099
In the Calcutta High Court
Case No : C.R.R. No. 38 of 2017

Priyanka Shaw

APPELLANT

Vs

Tate Of West Bengal & Anr.

RESPONDENT

Date of Decision : 03-05-2018

Acts Referred:

Code of Criminal Procedure, 1973 — Section 195, 197, 200(a), 202, 204(1), 244, 245(2), 340, 362, 401, 482

Indian Penal Code, 1860 — Section 186, 228, 342, 353, 506

Citation : (2018) 05 CAL CK 0099

Hon'ble Judges : SHIVAKANT PRASAD, J

Bench : Single Bench

Advocate : Debanshu Ghorai, Tirthankar Ghosh, Satadru Lahiri

Final Decision : Allowed

Judgement

This is an application under Section 401 read with Section 482 of the Code of Criminal Procedure, 1973 challenging the order dated 8th September,

2016 passed by the learned Chief Judicial Magistrate, Purba Medinipur at Tamluk in connection with CR Case No. 224 of 2016 under Sections

186/228/353/342/506 of the Indian Penal Code, 1860 presently pending before the learned Chief Judicial Magistrate, Purba Medinipur at Tamluk

whereby and whereunder the opposite party accused in the said complaint case was discharged after issuing process against him.

It is curious to note that the complainant petitioner is one Priyanka Shaw, a member of the Cadre of the West Bengal Judicial Service, presently

posted as Civil Judge (Junior Division), 1st Court, Tamluk, Purba Medinipur and on the basis of the complaint before the learned CJM, Tamluk, Purba

Medinipur a CR Case No. 224 of 2016 was initiated against the accused/opposite party for the alleged offence under the provisions of Indian Penal

Code mentioned above. The fact leading to this application may be briefly stated as hereunder :

On 21st April, 2016 at about 10.30 a.m. the accused came to the chamber of the complainant/petitioner and requested her to attest his prescriptions,

certificates and medicine purchase bills. The complainant directed her Sheristadar to segregate the prescriptions, certificates etc. except the medicine purchase bills as the medicine purchase bills or vouchers are not required to be attested. At about 1-45 p.m. after the complainant/petitioner got down

from the dais of the Court, the accused person came in her chamber and asked her to attest the photocopy of the documents along with the medicine

purchase bills which she had already denied. Thereafter, the opposite party no. 2 became furious, abused the complainant petitioner with

unparliamentary languages, challenged her ability, authority, integrity, educational qualification, family background, dedication etc. and he did

contemptuous act towards her lawful authority.

Accused person further did not allow her to come out from her chamber and as such, the petitioner/complainant could not perform any judicial work at

the second session of the Court. The Sheristadar, Ejlas Peon and others repeatedly tried to restrain the accused person from doing this illegal activities

but the accused person continued such wrongful act/actions till 04.05 p.m. and thus interrupted in the discharge of the administration of public duties.

On the complaint of the petitioner learned CJM, Purba Medinipur took cognizance and registered the case as CR 224 of 2016 against the opposite

party and has issued the process as per the provisions of Section 204(1) Cr.P.C. against the opposite party no. 2/accused person under Sections

186/228/353/342/506 of the Indian Penal Code and posted the case for return of the summons and appearance by the opposite party. However,

considering that the petitioner/complainant is a public servant purporting to act in discharge of official duty, her examination was dispensed with as per

Section 200(a) Cr.P.C.

This Court is prompted to take note of the word "public servant". The Chief Judicial Magistrate concerned is not perhaps in the knowledge of the

decision of the Hon'ble Supreme Court passed in All India Judges' Association "versus Union of India [AIR 1993 (SC) 2493] wherein the

Hon'ble Supreme Court observed and held that a Judicial Officer or a Judge is

not a public servant rather he is the holder of a public office like

MLAs, MPs, Ministers as they discharge the sovereign function and not the regal function. The complaint made was by Civil Judge (Junior Division)

and is a Court.

It would appear from the order impugned dated 8.9.2016 that the opposite party/accused who was earlier enlarged on bail was present and had filed

an application for his discharge on the ground that there was non compliance of the provision under Section 340 of Cr.P.C. read with Section 195 of

Cr.P.C. which was allowed and the accused was discharged by the CJM concerned. It would be apt to reproduce the observation made by the CJM

while passing the impugned order dropping the case against the accused opposite party no. 2 herein and discharging him from the case which reads

thus :

“On the strength of aforesaid application the accused person has prayed for discharging him from this case on the ground that at the relevant time

the accused person was working as L.D.C. of the Ld. Judge under the Judgeship of District Purba Medinipur and there is violation of appropriate

provision of law regarding lodging complaint against the employee in respect of alleged offence alleged to be committed in discharging his official duty

during official hours. At the time of hearing Ld. Advocate for the accused person contended that as per the mandatory provision of Section 195 of

Cr.P.C. read with Section 340 of Cr.P.C., the Ld. Judge ought to have been expedient in the interest of justice that an inquiry should be made into the

offence as referred to in clause (b) of sub section (1) of section 195 of Cr.P.C. after giving an opportunity to the accused person to be heard and after

such preliminary inquiry the Ld. Judge should have recorded her findings to that effect and thereafter make a complaint to the Ld. Magistrate.

At the time of hearing it has been also contended by the Ld. Advocate for the accused person that at the relevant time the accused was a public

servant in respect of offence alleged to have been committed by him while acting or purporting to act in discharging of his office duty, so as per the

provision of Section 197 of Cr.P.C. without obtaining prior sanction of the Ld. District Judge present proceeding against the accused is bad in law.

It has also been contended by the Ld. Advocate that initially departmental inquiry should be initiated and thereafter on the sanction of the appropriate

authority the present proceeding ought to have been initiated on strength of written complaint lodged by the Ld. Judge. Section 197 of Cr.P.C. is

umbrella for a public servant in respect of offences alleged to have been committed in discharging his official duty. At the time of hearing Ld.

Defence counsel has cited the decision of our Apex Court as reported in (2016)1 C Cr LR(SC) 572 wherein it is held that without obtaining any prior

sanction of the appropriate authority cognizance taken against a public servant in respect of offence alleged to have been committed in discharging his

public duty is bad in law and the case is not maintainable. Having considering the above all and having considering the present position of law, the

petition filed by the accused on 22.06.2016 is hereby allowedâ??.

Thus, it appears that the learned Magistrate has entertained the application for discharge in connection with the instant case on the ground of alleged

noncompliance of mandatory provision of law as mentioned above or for taking cognizance of the offences complained against the opposite party

without having obtained sanction from the appropriate authority and without appreciating that the prayer of the accused opposite party no. 2 in

connection with the instant case is a pre-matured one and the same cannot be entertained till evidence before charge in connection with the case is

recorded and is considered by the learned Magistrate as per the provisions of â?? Trial of Warrant Cases instituted otherwise than on Police Reportâ??

as provided under the Chapter XIX of Code of Criminal Procedure, 1973.

Mr. Tirthankar Ghosh, learned counsel for the petitioner, submitted that the learned Magistrate has failed to appreciate that once the learned

Magistrate on receipt of the complaint was having satisfaction as to the prima facie case against the opposite party no. 2 for having committed

offences complained of and for that the process of the Court under Section 204(1) Cr.P.C. was issued against the accused, opposite party no. 2 under

Sections 186, 228, 353, 342, 506 IPC on prima facie consideration that there is sufficient ground for proceeding against the accused, the only remedy

which is available to the opposite party is to assail the said order of issuance of the process and to approach this Court by invoking the inherent power

of this Court under Section 482 of the Code of Criminal Procedure. It is settled principle of law laid down by the Honâ??ble Apex Court that once

the learned Magistrate issued the summons against the opposite party for

commission of offences alleged, the learned Magistrate cannot recall its own order of the process and is specially barred under the provision of Section 362 of the Cr.P.C.

I am in total agreement with the learned counsel for the petitioner on this aspect. On an application for discharge being filed by the accused, the

Magistrate has no power to review or reconsider his decision to issue process against the accused. When, pursuant to the issuance of process, the

accused has been summoned, the remedy open to him is to apply for discharge only under the provision of Section 245(2) Cr.P.C., but cannot apply

for recall of the summon but he has to enter appearance and the case has to proceeded. The prayer for discharge can be considered at proper stage.

It would be profitable to reproduce the provision relating to discharge of the accused which enjoins thus :

â??245. When accused shall be discharged. â?" (1) If, upon taking all the evidence referred to in section 244 the Magistrate considers, for reasons to

be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge

him. (2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons

to be recorded by such Magistrate, he considers the charge to be groundless.â??

Therefore, Section 245 Cr.P.C., enables the Magistrate to discharge the accused only if after taking all the evidence referred to in Section 244

Cr.P.C., he considers for the reason to be recorded that no case against the accused has been made which, if unrebutted, would warrant his

conviction, nevertheless, soon after appearance the accused may pray for discharge on the ground of technical defect like want of sanction for

prosecution, incompetence of the complainant to file complaint and inherent improbability or falsity of the allegations made in the complaint.

If on the face of the complaint or evidence recorded under Sections 200 and 202 Cr.P.C., there is technical defect which makes the complaint not

maintainable for want of sanction for prosecution, the Magistrate can discharge the accused even without taking any evidence. Ergo, this Court is

called upon to consider on the face of the allegations in the complaint levelled against the accused, as to whether at all, the complaint suffers from

technical defect for want of sanction for prosecution against the accused/opposite

party no. 2 herein.

Now, as regards the sanction which the learned Magistrate has relied on a decision of the Honâ??ble Apex Court reported in 2016(1) C Cr LR SC

572 wherein it has been held that without obtaining any prior sanction of the appropriate authority cognizance taken against the public servant in

respect of the offences alleged to have been committed in discharging his public duty is bad in law and the case is not maintainable because the

provision of Section 197 Cr.P.C. is an umbrella for a public servant in respect of offences alleged to have been committed in discharge of his official

duty. Alas! The Chief Judicial Magistrate could have gone through the cited decision with the set of facts made therein. To my understanding in view

of the alleged facts and the complaint over which the CJM had taken cognizance of the offences alleged by issuance of the process, has been totally

misconstrued in so far as construing the facts and the alleged wrongful act meted out to the petitioner by the opposite party no. 2 who happens to be

an assistant in the said Court undoubtedly a public servant.

If the petitioner was a Drawing & Disbursing Officer, no doubt it was her duty to consider the bills for reimbursement of any medical expenses

incurred by any staff but the matter obviously pertains to act not within the meaning of discharge of official duty. It can be inferred from the complaint

itself that all these bills with the original vouchers ought to have been submitted by the opposite party staff concern with the Sheristadar who has to

verify, check and prepare the bills and then place it before the DDO for its passing. It is not the duty of the DDO to attest the photocopies of the

medical vouchers as original vouchers are required to be submitted. It signifies that this staff opposite party no. 2 herein is in the habit of somehow

manipulating bills and every billing for reimbursement of the medical expenses again and again by production of attested photocopies of the medical

bills/vouchers. The Judicial Officer the complainant had rightly instructed the Sheristadar to segregate bills from the original prescription and

certificate.

Mr. Debanshu Ghorai, learned counsel for the opposite party no. 2 has referred to a decision in the case of State of Orissa Through Kumar

Raghvendra Singh and others vs. Ganesh Chandra Jew reported in (2004) 8 SCC 40 in respect of Section 197 of Cr.P.C. where it is held that

protection is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not

merely a cloak for doing the objectionable act -- Therefore, the concept of S. 197 does not get immediately attracted on institution of the complaint

case -- Test to determine the reasonable connection between the act complained of and the official duty has to be taken note of. Even if the public

servant acted in excess of his duty, if there exists the said reasonable connection, held, the excess will not deprive him of the protection. But it does

not mean that he will restrain and confine the Judicial Officer who has to function as a Judge in the Court of law but she was restrained and ruckus

was created by the opposite party no. 2 to this extent that the complainant petitioner was not allowed to take her judicial chair.

So, obviously this amounts to serious misconduct on the part of the erring staff. Though the order sheet of the Court shows that the opposite party

tendered apology unconditional before the complainant/the petitioner herein and she had accepted his apologies in so far as personal grievances were

concerned but the complainant/petitioner has expressed that she was unable to accept his apologies regarding contemptuous act on his part as a result

the petitioner was prevented from resuming her judicial work after the recess at 2-00 p.m. and it amounted to hindrance in the judicial administration

by him. He was even forbidden by the Sheristadar and other staff and the peon not to behave in the wrongful manner. The opposite party no. 2 does

not appear to have a sublime behaviour.

Learned counsel for the opposite party no. 2 has also referred to a decision in the case of Amal Kumar Jha vs. State of Chhattisgarh and another

reported in (2016) 6 SCC 734 wherein it has been held that before S. 197 can be invoked, it must be shown, that official concerned was accused of

offence alleged to have been committed by him while acting or purporting to act in discharge of his official duties. It is not the duty which requires

examination so much as the act, because official act can be performed both in discharge of official duty as well as in dereliction of it. The act must fall

within the scope and range of official duties of public servant concerned. The opposite party was no doubt a public servant as an assistant to the Court

but the act, which he performed as alleged, in my considered view, an act that does not fall within the definition clause of official act.

Per contra, Mr. Tirthankar Ghosh, learned counsel for the petitioner referred to certain judgments of the Honâ??ble Supreme Court, that is, in the

case of Punjab State Warehousing Corporation vs. Bhushan Chander and another, reported in (2016) 13 SCC 44 and in the case of Adalat Prasad vs.

Rooplal Jindal and others reported in (2004) 7 SCC 338 relating to recall of process issued against an accused wherein it is held that in absence of

such power being conferred by the Code, Court has no power to recall the process issued. Observation in Mathew case, (1992) 1 SCC 217 has been

relied therein that for recalling an erroneous order, no specific provision of law is required. It runs counter to the scheme of the Code which has not

provided for review and prohibits interference at interlocutory stages. It would be profitable to reproduce the observation made in paragraphs 7 and 8

of the cited decision as under:

â??7. It was held in Mathew case that Section 204 of the Code indicates that the proceedings before the Magistrate commence upon taking

cognizance and issuance of summons to the accused. When the accused enters an appearance in response to the summons, the Magistrate has to

take proceedings under Chapter XX of the Code. It was further held that the need to try the accused arises only when there is an allegation in the

complaint that the accused has committed the crime. Hence, if there is no allegation in the complaint involving the accused in the commission of the

crime it is implied that the Magistrate has no jurisdiction to proceed against the accused. In that background this Court held that it is open to the

accused served with summons to plead before the Magistrate that the process against him ought not to have been issued and if the Magistrate is

satisfied with such an argument, he may drop the proceedings on reconsideration of the complaint on the ground that there was no offence for which

the accused could be tried. This Court further observed in Mathew case, such power is the Magistrateâ??s judicial discretion and no specific

provision is required for the Magistrate to drop proceedings or rescind the process. It also held that the order of issuing process being an interim order

and not a judgment, it can be varied or recalled. The Court also held that the fact that the process has been already issued is no bar to drop the

proceedings, if the complaint on the very face of it does not disclose any offence against the accused.

8. It is thus seen that in Mathew case this Court held that after issuance of summons under Section 204 of the Code, it was open to the Magistrate on being satisfied at the instance of the summoned accused to reconsider its decision of issuing summons under Section 204. This Court in that case also held that the Magistrate issuing the summons can do so only on there being material to issue summons hence the summons erroneously issued can be recalled by the Magistrate for which no specific provision is required.â? Yet Mr. Ghosh refers to a decision in the case of Choudhury Parveen Sultana vs. State of West Bengal and another reported in (2009) 3 SCC 398 which relates to applicability of Section 197 inviting my attention to the observation made in paragraphs 18 and 19 which reads thus :

â??18. The direction which had been given by this Court, as far back as in 1971 in Bhagwan Prasad Srivastava case holds good even today. All acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of Section 197 CrPC. On the other hand, there can be cases of misuse and/or abuse of powers vested in a public servant which can never be said to be a part of the official duties required to be performed by him. As mentioned in Bhagwan Prasad Srivastava case the underlying object of Section 197 CrPC is to enable the authorities to scrutinize the allegations made against a public servant to shield him/her against frivolous, vexatious or false prosecution initiated with the main object of causing embarrassment and harassment to the said official. However, as indicated hereinabove, if the authority vested in a public servant is misused for doing things which are not otherwise permitted under the law, such acts cannot claim the protection of Section 197 CrPC and have to be considered de hors the duties which a public servant is required to discharge or perform. Hence, in respect of prosecution for such excesses or misuse of authority, no protection can be demanded by the public servant concerned.

19. In the instant case, certain deeds and acts have been attributed to Respondent 2 and another accused, which cannot be said to have been part of the official duties to be performed by Respondent 2. Hence, in our view, Respondent 2 was not entitled to the protection of Section 197 CrPC in respect of such acts.â? Therefore, the learned Magistrate committed error in law and fact by failing to appreciate the allegation in the petition of

complaint which attracts the charges punishable under Sections 186 and 228 of Indian penal Code and directly affecting the functioning of a lawful

duties of the complainant/petitioner as a Judicial Officer and learned Magistrate further failed to appreciate that protection available to the public

servant under Section 197 Cr.P.C. is solely for protecting the public servants against frivolous, vexatious or false prosecution for offences alleged to

have been committed by them while acting or purporting to act in discharge of official duty, for ensuring proper discharge of their official duty but the

facts situation in the present case is on different footing as it would be reflected from the allegation made in the petition of complaint itself because

there is no reasonable connection between the complained delinquency and discharge of official duty, insomuch so, the opposite party no. 2 being a

clerk in the Court has abused a Judicial Officer and restrained her from presiding over the Court after the recess period.

Having heard the learned counsel for both the parties at length and having respectfully considered the decisions of the Honâ??ble Supreme Court as

cited above and in the context of my observation made concerning the order impugned and in the context of allegation as levelled against the opposite

party no. 2 by the petitioner in her complaint before the learned Magistrate, I am of the considered opinion and accordingly, reiterated and hold that the

allegation so made against the opposite party no. 2 cannot be considered as an act in the discharge of official duty warranting the complainant to

obtain a sanction of the concerned authority for prosecution under the provision of Section 197 CrPC.

Hence, the order dated 8th September, 2016 passed by the learned Chief Judicial Magistrate, Tamluk, Purba Medinipur in connection with CR Case

No. 224 of 2016 under Sections 186/228/353/342/506 of the IPC pending before him is hereby set aside as devoid of any merit. Accordingly, the

application being CRR 38 of 2017 is allowed. Let a copy of this order be sent down to the learned Chief Judicial Magistrate, Tamluk, Purba Medinipur

for his information and to proceed with the complaint case according to law. Urgent Photostat certified copy of this order, if applied for, be supplied to

the parties on urgent basis.