

(1996) 07 DEL CK 0097

In the Delhi High Court

Case No : Criminal Miscellaneous Appeal No. 1696 of 1996

P.V. Narasimha Rao

APPELLANT

Vs

State (Central Bureau of Investigation)

RESPONDENT

Date of Decision : 30-07-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319

Citation : (1996) 3 AD 729 : (1996) 63 DLT 529 : (1996) 38 DRJ 273

Hon'ble Judges : S.K. Mahajan, J

Bench : Single Bench

Advocate : Kapil Sibal, W.A. Namani, Niti Dixit, R.P. Lao, Rashmi, S.G. Rao, Gopal Subramaniam, A.K. Dutt, P. Sisodia, Atul Sreedharan, S. Lal, R.L. Panjwani and O.P. Saxena, for the Appellant;

Judgement

S.K. Mahajan, J.

(1) Aggrieved by the order of the Chief Metropolitan Magistrate, passed u/s 319 of the Code of Criminal Procedure (in short referred to as "the Code"), adding the petitioner as an accused for being a party to the criminal conspiracy of cheating the complainant Lakhubhai Pathak, u/s 120B/420 Indian Penal Code, the petitioner has filed this petition for quashing the same. Before dealing with the contentions raised by the petitioner, let me go through the facts of the case.

(2) The complainant Lakhubhai Pathak is a resident of United Kingdom and is of Indian origin. He is stated to be a businessman running a firm in the business of food processing. In 1983, he is alleged to have come into contact with Chandraswami and Kailash Nath Aggarwal, both of whom made him believe that Chandraswami had a great influence in the official and political circles in India and was capable of getting any job through. Both of them suggested that the contract for supply of paper pulp and newsprint to India was a highly profitable job and the complainant is alleged to have been persuaded to secure the same and was assured all help for procuring the contract in his favor by use of the good offices .of Chandraswami and Kailash Nath Aggarwal. In December, 1983

the complainant is alleged to have been induced to pay an amount of Us \$ 1,00,000 for procuring the contract in his favor by using their good offices and he was so overwhelmed by their assurance that he believed whatever they said and an amount of Us \$ 1,00,000 was paid to Chandraswami by two cheques on 4th January, 1984 outside a New York Hotel. Another sum of around Us \$ 30,000 is also alleged to have been spent on the hospitality of Chandraswami and others. Chandraswami had assured the complainant that the contract papers would be handed over to him by the end of January, 1984 and" the supply was supposed to be completed by 15th April, 1984. Thereafter, in spite of repeated approaches made by the complainant, Chandraswami failed to secure the contract for him and it is alleged that the complainant was cheated by the said Chandraswami and Kailash Nath Aggarwal. The complainant first tried to get his money back from Chandraswami, however, when he failed to get that money back, he decided to expose the fraud committed by Chandraswami. He wrote letters to many persons levelling allegations against Chandraswami which led to the filing of a defamation suit against the complainant by Chandraswami. This suit was ultimately dismissed. The complainant filed a complaint with the Indian High Commission against Chandraswami and Kailash Nath Aggarwal for initiating action against them for their having dishonestly induced the complainant to pay Us \$ 1,00,000 when they had neither the resources nor the contact for procuring the contract for him. Case Fir No.RC.I(5)/88/SIU Ix u/s 120-B/420 Indian Penal Code was registered on 5th February, 1988 against Chandraswami and Kailash Nath Aggarwal. Initially they were released on bail, however, presently they are in custody.

(3) The Court took cognizance of the offence of criminal conspiracy to cheat as well as of actually cheating the complainant and issued process against Chandraswami and Kailash Nath Aggarwal and they are facing trial. The complainant appeared in the witness box and stated on oath that Chandraswami .had told him that he had a talk with the Minister and the Minister had assured him that he would help Pathak. It was further stated during the course of the statement by the complainant that on 22/23rd December, 1983 when he had gone to meet Chandraswami in his room in Holorum House Hotel, Manhattan, New York, a Minister came in the room of Swamiji and the complainant came to know that his name was P.V.Narasimha Rao. He remained with Chandraswami in his room for about one/one and a half hour when he along with some other persons remained sitting outside and when Chandraswami and Mr.Narasimha Rao came out of the room, the complainant was introduced by Chandraswami to Mr.Narasimha Rao that Mr.Pathak was a big businessman. Mr.Narasimha Rao is alleged to have told the complainant "Swamiji had told me everything and that my work will be done". On this assurance, the complainant felt very happy, as he was the only person in the gathering who had been introduced to Mr.Narasimha Rao by Chandraswami. Thereafter, Chandraswami asked the complainant to arrange for food. Vegetarian food is alleged to have been arranged by the complainant for Chandraswami, P.V.Narasimha Rao,

Martindale Congressman Damley and Kailash Nath Aggarwal. Though Chandraswami had asked the complainant to arrange for US \$ 4 to 5 lakh in connection with the contract, however, on the complainant expressing his inability to make arrangement for such a huge amount, Chandraswami had alleged to have told him to arrange US \$ 1,00,000. This amount of, US \$ 1,00,000 was not deposited in any account of the complainant as was suggested by Chandraswami to prove the financial soundness of the complainant but was handed over by means of two cheques to Chandraswami to be deposited in an account exclusively known to Chandraswami and the complainant was not aware of its details. The complainant is alleged to have written various letters to Mr.P.V.Narasimha Rao right from 1991 onwards informing him that his name had been used by the complainant for awarding of a contract of paper pulp in favor of the complainant and it was on the assurance of Mr.Rao that "Chandraswami had told him everything and the work will be done" that the complainant had parted with money to Chandraswami. The letters written by Mr.Pathak to Mr.Rao clearly mention about the meeting which Pathak had with Mr.Narasimha Rao in Holorum House Hotel, Manhattan, New York and that Mr.Rao having told Mr.Pathak that his work would be done that the money was paid. No reply to any of the letters written by Mr.Pathak was received from Mr.Rao, though one of the letters dated January 20, 1995 has been acknowledged by the Prime Minister's Office on April 5, 1995.

(4) The complainant was under cross-examination by the counsel for Chandraswami and Kailash Nath Aggarwal and a substantial part of the cross-examination had been completed up to 8th July, 1996. The Chief Metropolitan Magistrate, on the basis of the evidence which had been recorded by that date, vide his orders dated July 9, 1996 held that the statement of the complainant shows grounds for proceeding against Mr.P.V.Narasimha Rao and, accordingly, added him as an accused in a case for being a party in the criminal conspiracy and cheating and he was summoned u/s 120-B/420 Indian Penal Code. It is against this order that the present petition has been filed by the petitioner.

(5) The contention of Mr.Sibal is that it is in the rarest of rare cases that the Court should exercise its powers u/s 319 of the Code to summon a person as an accused and that too in a case where there are compelling reasons for summoning him. The contention is that the Court, while taking cognizance of an offence u/s 190, has the advantage of the final report of investigation u/s 173(2) of the Code before it and no reasons are required to be given by the Magistrate at the time of taking cognizance and issuing process on the basis of the final report submitted u/s 173(2). While issuing process u/s 319 of the Code to a person who is not an accused, the Magistrate ought to have followed the same procedure by directing investigation into the allegations made by the witness and in any case if any order of summoning was to be passed, the same could have been passed only after hearing the petitioner and giving him an opportunity to show cause. According to him, the procedure adopted is not only violative of Article 21 of the Constitution of India but was also in violation of the principles of

natural justice and as such the order is liable to be set aside. Further contention is that the statement of the complainant had not yet been completed before the Chief Metropolitan Magistrate and there is, Therefore, clearly an error on his part in summoning the petitioner without completing the evidence, as according to him, the evidence includes examination-in-chief, cross-examination and re-examination. Without cross-examination, according to Mr.Sibal, there could not be a prima- facie proof of fact and to that extent the statement could not be relied upon. Mr.Sibal has also tried to attack upon the credibility of the complainant by arguing that the complainant was a person who himself tried to cheat the family of his brother when he offered Chandraswami to share the amount in excess of US\$15 million which could be gathered by sale of the estate of the brother of the complainant. He, Therefore, submits that the complainant is not a person of any credibility and his varying statement at various stages did not inspire confidence. It is also submitted by him that even assuming the statement of Lakhubhai Patha:k to be true, no offence u/s 120-B read with Section 420 Indian Penal Code , made out as there was no inducement on the part of the petitioner to pathak to part with property. Lastly, it has been argued that there was a delay of almost 13 years in naming the petitioner and there were, Therefore, no compelling reasons for the Chief Metropolitan Magistrate to add the name of the petitioner as co-accused and issue summons to him to appear in the Court.

(6) Pursuant to the recommendations made by the Law Commission in the 41st report, Section 351 of the old Code was replaced by Section 319 in the present Code giving powers to the Court to issue summons to a person, other than the accused, if from the evidence it appeared that such person was also concerned in that offence, cognisance of which had already been taken by the Court. Section 319 of the Code reads as under :- Section-319 : "Power to proceed against other persons appearing to be guilty of offence:

1.Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed. 2. Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid. 3. Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed. 4. Where the Court proceeds against any person under sub-section (1) then a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard; b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

(7) Relying upon Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and

Others, , Mr.Sibal contends that the power u/s 319 is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons existed for taking cognisance against the other person against whom action had not been taken. According to Mr.Sibal, on the unverified statement of the complainant without their being any corroboration, the Chief Metropolitan Magistrate was not justified in issuing summons to the petitioner.

(8) At the stage of issuing process u/s 319 of the Code, the question is whether the Magistrate must satisfy himself about the person to whom the process is being issued having committed an offence or such process can be issued only on a prima-facie view of such person being involved in the commission of offence. At this stage, the only thing on record before the Magistrate was the statement of Lakhubhai Pathak and the documents which included the letters written by him to the petitioner. According to Mr.Sibal it is a fundamental rule of criminal law that investigation has to be carried out first and the prosecution follows only after such investigation and this process cannot be reversed by first issuing-the summons u/s 319 and then start investigation.

(9) MR.SIBAL relies upon the judgments reported as R.J.Lakhia Vs. State of Gujarat 1982 C L J 1687; Amarjit Singh Vs. State of Punjab and Haryana 1983 C L J 98; Gulam Mandal Vs. Nazam Hussain 1987 C L J 729 and Mohan Lal Vs. State of U.P. 1990 U` C R 254, in support of his contention that the statement of Lakhubhai Pathak was not evidence within the meaning of Section 319 of the Code on which any reliance could be placed by the Magistrate for purposes of issuing summons to the petitioner.

(10) In R.J.Lakhia Vs. State of Gujarat, (Supra), on the basis of investigation in a case registered u/s 420, 366/34 Indian Penal Code, the charge sheet was filed in the Court of the Magistrate who committed the same to the Court of Sessions". During the course of trial in the Sessions" Court, one Kamla Bai was examined and in her statement she made some allegations against an advocate. Before she could be cross-examined, the clerk of the advocate appeared as a witness and he also stated about the involvement of the advocate. He was also not cross-examined. On the basis of the statement of the said two witnesses, the Court on application of the Public Prosecutor issued summons to the advocate to be added as an accused in the trial which was going on before the Sessions" Judge. The advocate challenged the said issuing of summons against him in the High Court. The learned single Judge of the Gujarat High Court while allowing the petition has held that he failed to understand as to what could at all be the prima-facie case against the advocate and why should a senior advocate aged about 55 years be so demoralised so as to be hand in glove with a young girl of about 18 years. The Judge held that "When the advocate is directed to be in the dock along with other three accused persons, I am constrained to say that I hardly emphasise the need of protecting the dignity and honour of any Advocate practicing in any law Court in the State. If Judges shut their eyes to the dignity, decorum and self-respect of an Advocate, why should the members of legal

profession, who are counter parts of Administration of Justice at all care for the dignity of the Judges? May it be realised that in our democratic set up, the Judges' dignity can never be a one sided traffic, and can never be divorced from the dignity of an Advocate. The concept of maintaining dignity and decorum of our law Courts is essentially based upon mutual respect for the Bar and the Bench. Even man to man dignity can only be preserved and maintained by reciprocation and mutual respect. This principle can never be lost sight of by any Judge, particularly when, for maintaining the respect or dignity of a court of law, there is the Contempt of Courts Act for the benefit of any Presiding Judge." The Court further held "What was the hurry and undue haste on the part of the learned trial Judge to postpone the cross-examination of the aforesaid two witnesses? Why should the learned trial Judge not see that the two witnesses were cross-examined? Was it not the duty of the learned Prosecutor or the learned trial Judge to request Mr.Lakhia and not to summon Mr.Lakhia, to verify as to what he had to say about some passing allegations of a young desperate girl and the concerned clerk."

(11) Gujarat High Court in the above case has not in any manner held that the statement of a witness who was not subjected to cross-examination cannot be read as evidence within the meaning of Section 319 of the Code of Criminal Procedure. The Court being concerned mainly about the dignity of an Advocate held that the trial Court should have requested the advocate to appear for purposes of verification as to what he had to say about some passing allegations of a young desperate girl and not summon him u/s 319 of the Code. It is not understood as to under which procedure the Court, before summoning a person In Court, has to enquire from him as to what he has to say in defense to the allegations made against him. A person can only be said to be an accused only after the process is issued against him. Unless an order for summoning a person is passed against him, he has no locus standi to participate in the proceedings or to produce his defense. Any enquiry made by the Magistrate would be beyond his powers.

(12) The High Court of Allahabad in Shivrani and another Vs. Suryanarain and another 1994 CLJ 2026 did not follow the judgment in Lakhia's case and went on to hold that in view of the judgment in Kishun Singh and Others Vs. State of Bihar, , "it is not correct to say that the word "evidence" as defined in Section 3 of the Evidence Act, will not cover a statement of a witness which has been recorded in examination-in-chief."

(13) In Amarjit Singh Vs. State (Supra), it was held that "though the Magistrate was competent to summon the person u/s 319 who was discharged by him, the examination-in-chief alone could not be said to be such evidence upon which the Magistrate could act u/s 319 as it was incomplete statement. The person summoned u/s 319 should be given an opportunity to cross-examine the witness." It is not clear from the judgment as to what were the facts of the case.

(14) In Gulam Mandal Vs. Nazam Hussain (Supra), the Calcutta High Court has

relied upon the judgment in R.J.Lakhia and Amarjit Singh's case. Relying upon the earlier judgment of the Court in Barky Vs. State, the Allahabad High Court in Mohan Lal Vs. State of U.P. 1990 Up Criminal Law Reporter has held that it would be an error to summon a person merely on the basis of statement recorded in examination-in-chief of the witness and without waiting for cross-examination to be completed. No reasons have been given for the view expressed by the Court in this judgment.

(15) As discussed above, a contrary view has been taken by the Allahabad High Court in Maqbol Vs. State of Up 1988 CLJ 1467 and Shivrani and another Vs. Suryanarain and another (Supra).

(16) At the time of summoning a person u/s 319 of the Code, Magistrate forms an opinion on the basis of the evidence available on the record at that stage that a prima-facie case is made out against the person who is going to be summoned. That opinion has to be formed on the basis of the evidence existing at that time and the same can be changed at a later stage of the trial. The evidence available on record will include the examination-in-chief of the witness which he has recorded. A person to whom summons are issued is not an accused at that stage and he does not have a right to cross-examine the witness.

(17) Jaspal Singh.J. in H.K.L.Bhagat Vs. State 1996 (1) Ad Delhi 393 held that the word evidence in Section 319 of the Code must receive a liberal construction and examination-in-chief is also evidence. Relevant observations of the Court were as under

"THE main purpose of Section 319 of the Code appears to be that the whole case against all known suspects should be proceeded with expeditiously. The provision thus intends to serve a laudable purpose. Consequently, the word "evidence" must receive a liberal construction. To say that "evidence" as used in sub-section (1) of Section 319 must necessarily mean examination-in-chief tested by cross-examination would neither further the purpose of the provision nor promote the cause of criminal justice. When the Supreme Court in Kishun Singh and others Vs. State of Bihar (Supra) uses the words "from the material available on record", it, in my humble view, indicates that the word "evidence" is to be used in a comprehensive sense. Sub-section (1) of Section 319 does not relate to evidence as between parties on record having the right to cross-examine the witnesses. It relates to a person who is not yet an accused and thus has no right to cross-examine the witnesses. He is a stranger to the proceedings and thus unconcerned with the question as to whether the witness in the proceedings has been cross examined or not by the already arraigned accused. He would come into the picture only when process is issued. Even at the stage when the court is considering the question as to whether he should be summoned or not, he remains a stranger because that is a question which concerns the court and perhaps the complainant only. Looked at from that angle, one may think of provisions relating to complaints (Chapter Xv of the Code) whereunder the statements are only in the form of examination-in-chief and are not tested on

the anvil of cross-examination. The Court u/s 319(1) acts likewise and thus may form its prima-facie view on the basis of the examination-in-chief itself. This much with regard to the dispute raised around the word "evidence".

(18) The submission of Mr.Sibal is that the law laid down by Jaspal Singh,J. in H.K.L.Bhagat Vs. State (Supra), is not the correct one as four Judgments of different High Courts have taken a contrary view. After giving my thoughtful consideration to the submissions made by Mr.Sibal and taking into consideration the judgments in which contrary view has been taken, I have not been able to persuade myself to agree with Mr.Sibal or with the view taken in those judgments. I am in full agreement with Jaspal Singh,J. that none of the said judgments give any reason as to why the statement of the witness who has not been subjected to thorough cross- examination cannot be read in evidence for purposes of enabling the Magistrate to summon a person who is not arraigned as an accused in case on the basis of the material before the Court including the statement of the witness he comes to a prima-facie view that the said person is also involved in the commission of offence and is to be tried along with the accused. In my opinion, the law laid down in H.K.L.Bhagat Vs. State (Supra), is the correct proposition of law and I do not see any reason to differ with the same.

(19) The next contention of Mr.Sibal is that the Magistrate Issuing summons must be satisfied that from the evidence before him, he is of the opinion that the person to whom the summons were being issued had committed an offence for which he could be tried together with the accused. This evidence, according to Mr.Sibal, should be of such a compelling nature that the Court has no option but to issue summons and it has to be qualitatively different from the nature of evidence required for purposes of issuing process u/s 190 of the Code. He submits that the Court has without application of mind and in a casual manner issued the process summoning the petitioner without in any manner dealing with the evidence to find out as to whether any case has. been made out against the petitioner or there were compelling reasons for summoning him. In my opinion, at the time of summoning a person u/s 319 of the Code, the Magistrate has only to form a prima-facie view on the basis of material before him and has not to undergo the exercise to find out if such material would lead to the ultimate conviction of the said person.

(20) In Kishun Singh and Others Vs. State of Bihar, , the Supreme Court observed :-

"ON a plain reading of sub-section (1) of Section 319 there can be no doubt that it must appear from the evidence tendered in the course of any inquiry or trial that any person not being the accused has committed any offence for which he could be tried together with the accused. This power, it seems clear to us, can be exercised only if it so appears from the evidence at the trial and not otherwise. Therefore, this sub- section contemplates existence of some evidence appearing in the course of trial wherefrom the Court can prima- facie conclude that the person not arraigned before it is also involved in the commission of the crime for

which he can be tried with those already named by the police. Even a person who has earlier been discharged would fall within the sweep of the power conferred by Section 319 of the Code. Therefore, *stricto sensu*, Section 319 of the Code cannot be invoked in a case like the present one where no evidence has been led at a trial wherefrom it can be said that the appellants appear to have been involved in the commission of the crime along with those already sent up for trial by the prosecution."

(21) It was further observed by the Supreme Court that summoning of the person can be on the basis of the *prima-facie* view to be gathered from the material available on record.

"WE have already indicated earlier from the ratio of this Court's decisions in the cases of *Raghubans Dubey* and *Hareram* that once the court takes cognizance of the offence (not the offender) it becomes the court's duty to find out the real offenders and if it comes to the conclusion that besides the persons put up for trial by the police some others are also involved in the commission of the crime, it is the court's duty to summon them to stand trial along with those already named, since summoning them would only be a part of the process of taking cognizance. We have also pointed out the difference in the language of Section 193 of the two Codes; under the old Code the Court of Session was precluded from taking cognizance of any offence as a court of original jurisdiction unless the accused was committed to it whereas under the present Code the embargo is diluted by the replacement of the words the accused by the words the case. Thus, on a plain reading of Section 193, as it presently stands once the case is committed to the Court of Session by a Magistrate under the Code, the restriction placed on the power of the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted. On the Magistrate committing the case u/s 209 of the Code the Court of Session complete and unfettered jurisdiction of the court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can *prima-facie* be gathered from the material available on record."

(22) MR.SIBAL states that the law laid down in *Kishun Singh and others Vs. State of Bihar* (Supra) has been commented upon by the apex Court in *Raj Kishore Prashad Vs. State of Bihar* and another 1996 (4) Sup 87. In *Raj Kishore Prasad's* case, the apex Court has expressed its reservations to some of the observations made in *Kishun Singh's* case, though that view had met with approval in *Nisar and Another Vs. State of U.P.*, . While in *Kishun Singh's* case, the view taken by the Court was that the Court of Sessions has jurisdiction to summon a person u/s 319 of the Code immediately after committal of the case by the Magistrate to the Court of Sessions, on the basis of the material available on record, the only reservation which the Court had in *Raj Kishore Prasad's* case was whether such summons could be issued without recording any evidence by the Court of Sessions after the case has been committed to it. In the present

case, this is not the point for consideration as the summons have been issued after evidence has been recorded by the Court of Chief Metropolitan Magistrate and, Therefore, the judgment in Raj Kishore Prashad's case, in my view would not be of any assistance to the petitioner.

(23) In Joginder Singh and Another Vs. State of Punjab and Another, , the Court was dealing with the scope and ambit of the power of the Court u/s 319 of the Code. In this case, during investigation of the case registered against certain accused persons, the police appears to have found Joginder Singh and Ram Singh to be innocent and, Therefore, the charge sheet was not submitted against them and was submitted only against the remaining accused. During the course of evidence in the trial of the case, Joginder Singh and Ram Singh were also implicated in the incident whereupon on an application having been made by the Public Prosecutor, the Additional Sessions Judge issued summons to Joginder Singh and Ram Singh to face trial along with other three accused. The jurisdiction of the Court to issue summons to the appellants was challenged. The Supreme Court while dealing with the matter, held as under :-

"IT will thus appear clear that under S.193 read with S.209 of the Code when a case is committed to the Court of Session in respect of an offence the Court of Session takes cognizance of the offence and not of the accused and once the Sessions Court is properly seized of the case as a result of the committal order against some accused the power under S.319(I) can come into play and such Court can add any person, not an accused before it, as an accused and direct him to be tried along with the other accused for the offence which such added accused appears to have committed from the evidence recorded at the trial. Looking at the provision from this angle there would be no question of reading S.319(I) subject or subordinate to S.193."

(24) The Supreme Court clearly negated the contention that Section 319 should be read to be subordinate or subservient to Section 193 of the Code. Section 193 is a statutory provision. In case, Section 319 was not subservient to the statutory provision of Section 193 of the Code, how can it be subservient to the investigation which may be carried out by the police? Even if on the basis of investigation, the name of a person is not mentioned as an accused and his name is not stated in the police report submitted u/s 173 of the Code, the Court is not barred from issuing summons to the said person if in the course of trial, material comes before it to show the complicity of the said person in the offence. Section 319 of the Code is, Therefore, an independent provision, nothing to do with the investigation of the matter by the police. There is no need of first directing investigation in the matter before summons are issued to a person not before the Court as an accused.

(25) Under Article 21 of the Constitution, no person shall be deprived of his life or personal liberty except according to procedure established by law. The contention of Mr.Sibal is that unless an investigation is carried out into an offence alleged to have been committed by the petitioner, he is deprived of his

fundamental right to be investigated into the matter and the order of the Magistrate, Therefore, summoning him without there being any investigation into the alleged offence is a clear violation of the provisions of Article 21 of the Constitution. I am afraid, the argument of Mr.Sibal has no force and is to be noted and rejected. Section 319 is also a part of the statute and in case summons are issued to a person under the said provision it is only in accordance with the procedure established by law. I fail to understand as to how the petitioner is being deprived of his liberty by the procedure allegedly not established by the law.

(26) Next contention of Mr.Sibal is that there is a gross violation of principles of natural justice in this case in as much as the petitioner has been deprived of his right to show cause as to why he should not be summoned u/s 319 of the Code,

(27) There is no provision in the Code to give notice to the accused before issuing him summons u/s 319 of the Code. It is on the basis of evidence and material before the Court that summons are issued in case it appears that such person has committed the offence. Section does not contemplate any notice nor, in my opinion, it can be implied from the provisions of the Code. A person has no locus standi to appear before the Court unless he has been summoned as an accused under some provision of law and it is only after he appears in Court that he can challenge the order of summoning by making proper application. At the time of issuing summons, in my opinion, no notice is required to be given to him.

(28) In *Rawoof Patel Vs. State* 1996 CLJ 1471, it was held by the Andhra Pradesh High Court that when a cognizance is taken against some person other than the one named in the charge sheet for being imp leaded as an accused person, prior notice to the said person is not necessary.

(29) Further contention of the petitioner is that taking the statement of the complainant to be correct, no case has been made out against the petitioner and there is nothing on record to show that the petitioner was involved in the criminal conspiracy to cheat Lakhubhai Pathak. The argument is that the only statement made against the petitioner is that he was closeted with Chandraswami in his room for about one to one and a half hours and when he came out, he told the complainant that Swamiji had told him everything and his work would be done. The contention, Therefore, is that the same does not constitute any conspiracy as the complainant has not said as to what had transpired in the meeting between the petitioner and Chandraswami and in the absence of such a statement, no case could be made out against the petitioner for his being a party to criminal conspiracy to cheat Lakhubhai Pathak.

(30) As held in *Noor Mohammad Mohd. Yusuf Momin Vs. The State of Maharashtra*, the conspiracy from its very nature is generally hatched in secret. It is, Therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. Conspiracy can be proved by circumstantial evidence from which only an

inference of an agreement to commit an offence may legitimately be drawn. Indeed in most cases proof of conspiracy is largely inferential, though, inference must be founded on solid facts. Surrounding circumstances of antecedents and subsequent conduct amongst other factors constitute relevant matter. The agreement to do an illegal act by illegal means or a legal act by illegal means can also be proved by necessary implications. As held in *Kehar Singh and Others Vs. State (Delhi Administration)*, , generally a conspiracy is hatched in secret and it may be difficult to adduce direct evidence of the same. The prosecution may often rely on evidence of acts of various parties to infer that they were done in reference to their common intention.

(31) It is true that what transpired between the petitioner and Chandraswami when they were closeted together in the room for one to one and a half hour, is not known to anybody, however, immediately after they had come out, the petitioner told Lakhubhai Pathak that Swamiji had told him everything and his work would be done. If what Lakhubhai Pathak stated about his meeting with the petitioner is correct, the only inference which can be drawn from this alleged assurance of petitioner to Lakhubhai Pathak can be that in the room, Chandraswami must have told the petitioner about some work of Lakhubhai Pathak. At the relevant time, there were only two works about which Chandraswami and Lakhubhai Pathak had talked about. One was about the disposal of the estate of the brother of Lakhubhai Pathak and the other was the award of contract. At this stage, it may not be prudent for me to venture upon as to which of the two works were discussed between Chandraswami and the petitioner in the room. It has been stated by Lakhubhai Pathak that Chandraswami had assured him that he had a talk with the Minister and the Minister had assured that Pathak should be helped and it was thereafter that Pathak had a meeting with the petitioner in Hotel Holorum House, New York. Mr.Sibal contends that it has nowhere come in evidence that the Minister about whom a mention has been made by Chandraswami with Pathak was the petitioner. However, from the evidence I find that when Pathak complained about delay in procurement of contract, Chandraswami told him that he had done everything possible for Pathak in the matter of the contract and had got him introduced to "The Minister". On the basis of the evidence and a perusal of the letters which had been written by the complainant to the petitioner as also his defense in the liable suit where he had disclosed the expense of Us # 200 having been spent for arranging vegetarian lunch on 22nd December, 1983 to certain persons including the petitioner, it cannot be said that there was no material before the Chief Metropolitan Magistrate to come to a prima-facie view that there was complicity of the petitioner in the act complained of. However, these are all the questions which are not to be decided by me in the present proceedings and it is only in trial that these questions can be gone into. This is not the stage to weigh the evidence meticulously. The standard of ascertaining whether the material before the Magistrate disclosed sufficient grounds for proceeding against a person is lower than the one at the stage of framing charges. As held in

H.K.L.Bhagat Vs. State (Supra), "the trial Judge at the stage of issuing process to a person u/s 319 is not required to evaluate or appraise the evidence with a view to assess whether it was sufficient for his ultimate conviction."

(32) In Sher Singh Vs. Jitendranath Sen, , the Court was considering as to what was meant by prima-facie case and it was held that it only means that there was a ground for proceeding, "so far the Court is only dealing with the initial stage and he has to proceed if there is ground for proceeding but a prima facie case is not the same thing as "proof, which comes later when the Court has to find whether the accused is guilty or not guilty. "Proof is nothing but relief, according to the conditions laid down in the Evidence Act and it is an obvious fallacy to say that, because the Magistrate has found prima-facie case, Therefore, he believes the case to be true in the sense that the case is proved."

(33) There is clearly a distinction between prima-facie case and proof. The proof will come at a later stage but prima-facie case will come at the initial stage. If there exists prima-facie case against a person, then the Court will certainly have the power to summon him. It will not mean that the Magistrate summoning him at that stage has come to the conclusion that case has been proved against him. Mr.Sibal contends that once the Magistrate has given a finding that a prima-facie case is made out against the petitioner, he is bound to follow the same. The Calcutta High Court in Sher Singh Vs. Jitendra Nath Sen (Supra) was concerned with almost the similar arguments and it held:- He has to keep an open mind till the final stage, when the question for him would be to decide as to whether he should believe the evidence or not, and before that final stage is reached, the Magistrate would get at least one opportunity to revise his estimate."

(34) The argument, Therefore, that the Magistrate has already given a finding against the petitioner, has no basis. It was only on a prima- facie view of the matter that the Chief Metropolitan Magistrate has found the complicity of the petitioner in the matter.

(35) Petitioner did not reply to various letters written by Lakhubhai Pathak to him right from 1991 to 1995, when direct allegations had been made against him. Mr.Sibal contends that as an accused the petitioner was not liable to reply nor to lead any evidence. Moreover, it is for the prosecution not only to prove that the letters were sent but they were also received in the Office of the Prime Minister and were brought to the notice of the petitioner and even further the contents of the letters were still to be proved during trial. It is true that it is only during trial that the contents of the letter can be proved, however, till such time the trial starts, a prima-facie view can be taken about the letters which had been written by Lakhubhai Pathak to the petitioner, more so when one of the letters dated January 20, 1995 has been acknowledged by the Office of the Prime Minister. Reliance has been placed by Mr.Sibal upon a judgment reported as Hall Vs. Reginam 1971(1) E L R 322, to contend that petitioner was not required to reply any of those letters. In this case, it was held by Lord Diplock :-

"IT is a clear and widely-known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. A fortiori he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances, an inference may be drawn from a failure to give an Explanation or a disclaimer, but in their Lordships' view silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation."

(36) Another judgment relied upon by Mr.Sibal on this point is the judgment of Court of Appeal reported as *Wide Mann Vs. Walpole* 1891(2) Q B D 534. In this case, to a letter written by the complainant to the effect that defendant had promised to marry her, no reply was sent by the defendant and the Court held that unless it was made out to be an ordinary practice of mankind to answer, it could not be said that not answering is any evidence that the person who receive such letters admitted the truth of the statements contained in them. However, in the same judgment it was further held "that there might be cases in which the Court thought, having regard to the nature of the correspondence and the circumstances of it, the not answering one letter in that correspondence did amount to evidence of an admission." The observations of the Privy Council in *Hall Vs. Reginam* (Supra) were commented upon by a subsequent judgment of the Court of Appeal in *Regina Vs. Chandler* 1976 W L R 585 and it was held that :-

" WE have reservations about these two statements of law because they seem to conflict with *Rex V.Christie* [1914] A.C. 545 and with earlier cases and authorities. For reasons which will appear later in this judgment, it is not necessary in this case to review the law relating to the so-called right of silence. The law has long accepted that an accused person is not bound to incriminate himself; but it does not follow that a failure to answer an accusation or question when an answer could reasonably be expected may not provide some evidence in support of an accusation. Whether it does will depend upon the circumstances. We could not improve on what Lord Atkinson said in *Rex V. Christie*, at p.554 : "..... the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some Explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement, so as to make it, in effect, his own..... He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct, or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part. It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a

jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them."

(37) It may be true that an accused has a right to remain silent and does not reply to the accusations made against him, however, as on the dates when the letters were sent to the petitioner, he was not an accused. Though, it may not be proper to make any comments as to why no reply has been sent to the said letters in spite of a direct allegation made therein about the petitioner having met the complainant in the hotel in New York and assured him that his work would be done, however, it cannot be said that there was no material before the Chief Metropolitan Magistrate to come to a finding of the complicity of the petitioner in the case. Statement of the complainant read with other material on record, in my opinion, was sufficient for the Chief Metropolitan Magistrate to come to a prima-facie view of the complicity of the petitioner in the matter. It is only during trial of the case that any finding can be given by the Court as to what was the effect of these letters and what inference can be drawn against the petitioner due to his having not replied them.

(38) In State of Haryana and others Vs. Ch. Bhajan Lal and another Shri S.A. Khan, , it was held that the inherent powers u/s 482 of the Code can be exercised by the High Courts either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. Mr.Sibal contends that as per the guidelines laid down by the Supreme Court, the order of summoning is liable to be quashed as allegations made in the complaint as well as in the statement of the complainant before the Court, do not prima-facie constitute any evidence or make out a case against the petitioner and the allegations are so absurd and inherently improbable that no prudent person can ever reach the conclusion that there is sufficient ground for proceeding against the petitioner. It is further contended that the petitioner has been named with malafide intentions and ulterior motives.

(39) As I have already held, it is only on a prima-facie view of the matter that the Magistrate has to form his opinion about the complicity of a person in the commission of offence for which accused are already being tried in Court, that summons can be issued to the said person who is not before the Court. It is well settled by a long catena of decisions of the apex Court that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima-facie satisfied whether there are sufficient ground for proceeding against the accused. It is not the province of the Magistrate to enter into a detailed discussion of the merits and demerits of the case. At the stage of issuing process what the Magistrate has to see is whether there was evidence in support of the allegations made, so as to justify the issue of process and commencement of proceedings against the accused, and not whether the evidence was sufficient to warrant his conviction.

(40) In my view, it cannot be said that there was no material before the Chief

Metropolitan Magistrate to come to a prima-facie finding about the complicity of the petitioner in the commission of offence for which he has been summoned. On the strength of material before him, the Magistrate has come to the finding that a prima-facie case has been made out against the petitioner for summoning him u/s 319 of the Code and in my view the said order cannot be set aside in my jurisdiction u/s 482 of the Code.

(41) In view of the above discussions ,I do not feel that the Chief Metropolitan Magistrate by issuing summons to the petitioner has abused his powers u/s 319 of the Code. At this stage, in my opinion, it is not justified to embark upon an inquiry as to the probability, reliability or genuineness of the allegations made in the documents and the statement of Lakhubhai Pathak. I, Therefore, do not see any reason to interfere with the order of the Chief Metropolitan Magistrate and the petition is, accordingly, dismissed.

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