
(1982) 10 MP CK 0001
In the Madhya Pradesh High Court

Rajaram Gupta and Others

APPELLANT

Vs

Dharamchand and Others

RESPONDENT

Date of Decision : 29-10-1982

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 203, 204, 245, 252
Penal Code, 1860 (IPC) — Section 107, 120, 120A, 120B, 406

Citation : (1983) CriLJ 612 : (1983) 28 MPLJ 56

Hon'ble Judges : Chandrapal Singh, J

Bench : Single Bench

Judgement

Chandrapal Singh, J.

The petitioner seeks interference with the order of the Second Additional Judge to the Court of the Sessions Judge, Mandsaur in Criminal Revision No 38 for 1978, quashing the order of the Chief Judicial Magistrate. Mandsaur in Criminal Case No. 844 of 1977 of 6-3-1978 discharging the accused-petitioners (and others of offences punishable under Sees. 120B, 406 and 420 Indian Penal Code, and remanding the case to the trial Court (the Court of the Chief Judicial Magistrate, Mandsaur) for disposal of the case according to law and directing the Magistrate to possibly frame a charge u/s 409 Indian Penal Code also, if so made out after the evidence for the prosecution.

The Gwalior Maize products Ltd. Mandsaur was a registered company under the then Gwalior Companies Act and is deemed to be registered under the Indian Companies Act with its registered office at Mandsaur. It appears that the respondent No, 1 Dharamchand on his own behalf and on behalf of respondent No. 2 Bapulal on 12-3-1977 preferred a complaint against the accused-petitioners of whom the petitioner No. 1 Rajaram Gupta is the father and co-petitioner 2, 3 and 4, his sons, and three others including one Madanlal (since dead) and the respondent Nos. 3 and 4 - Jagdishsingh and Fatehsingh before the Chief Judicial Magistrate, complaining that Madanlal being the trustee and Jagdish Singh and Fatehsingh being the trustees of the debenture holders were

entrusted with the property of the company on 27-8-1954. They with a view to causing loss to the share-holders, of the association of whom he is the president, conspiring with the accused-petitioners sold the property of the company for Rs. 7 1/2 lacs when in fact it was worth about Rs. 70 lacs. As a result of conspiracy the accused-respondent Fatehsingh even brought a civil suit (No. 11-A of 1967) in the Court of the Additional District Judge, Mandsaur against the accused one Madanlal and the accused-respondent Jaadishsingh for preventing them from committing waste of the property, and continuing to act as trustees; but on 14-12-1967 the accused Fatehsingh (respondent No. 4) got the suit dismissed and on the same day without giving any notice of the agenda of the company passed resolution illegally and secretly as a result of which the property of the company came to be sold by Madanlal, Jagdishsingh and Fatehsingh (respondents 2 and 31 to the three sons of the petitioner No. 1 Raiaram Gupta. He, therefore, prayed that the accused be proceeded against for offences punishable under Sections 107, 120B, 406 and 420 Indian Penal; but earlier to it also he had preferred a similar complaint which had come to be dismissed on 9-2-1977 because of his absence.

The learned Chief Judicial Magistrate instead of proceeding u/s 200 Criminal Procedure Code straightway called a report of investigation from the Police Mandsaur and on finding that the Police had put up a final report after examining the complainant and his witnesses on oath registered a case under Sections 120B, 406, 420 and 107 Indian Penal Code on 27-4-1977. He consequently summoned the accused persons before him. The matter kept on lingering before him for one reason or the other during the course of which the accused one Madanlal died (resulting in the abatement of proceedings against him). Ultimately after hearing the complainant and the accused persons he by his order of 6-3-1978 purporting to act u/s 245(2) Criminal Procedure Code, discharged the accused of the offences for which they had been summoned earlier.

This led the complainants Dharamchand and Bapulal to prefer revision petition (No. 38 of 1978) before the Sessions Judge, Mandsaur which came to be heard and decided by the Second Additional Judge to the Court of the Sessions Judge, Mandsaur, who, as already pointed out, after setting aside the order of the Chief Judicial Magistrate, Mandsaur, has remanded it for disposal of the "case according to law and possibly framing a charge u/s 409 Indian Penal Code if so made out after the evidence for the prosecution.

The penultimate part of the impugned order runs as follows:

The lower Court would be free to frame charge u/s 409 of the Indian Penal Code if so made out after the prosecution evidence...

This could clearly have not been done because of the terms of Section 398 Criminal Procedure Code which runs as follows:

On examining any record u/s 397 or otherwise, the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the

Magistrate subordinate to him to make, and the Chief Judicial Magistrate may himself make or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed u/s 203 or Sub-section (4) of Section 204, or into the case of any person accused of an offence who has been discharged;

Provided that no Court shall make any direction under this section for Inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.

The only order that could be made by the revising Court under this section is for a "further inquiry". No direction, therefore, in nature of putting any impediment in the judicial discretion to be exercised by the lower Court has to be made. (See; Banchhanidhi Maharatha Vs. Srinibass Paikroy and Others,). Any direction or instruction indicating the manner in which further inquiry is to be made and particularly whether to frame a particular charge can also not be given. (See : Narasimhulu Naidu Vs. Pemmati Naga Reddy,

While deciding a revision petition some of the well settled principles have always to be kept in mind. For example, an order ought not to be lightly set aside unless it has entailed miscarriage of justice or where two views are possible merely the fact that the revising Court takes other view than the one taken by the lower Court. The bare possibility of an additional offence or some alleged offence being made out would not in itself justify further inquiry. A further inquiry ought not to be ordered also where it would prove futile. The order discharging an accused should not be interfered with unless it is perverse or on the face of the record incorrect or foolish perfunctory or glaringly unreasonable or has been made without recording reasons for discharging the accused.

The reasons recorded by the Chief Judicial Magistrate, if translated into English, would run somewhat as follows:

(1) From the contents of the complaint and from the deposition of Dharamchand (the complainant), the matter was reported at the police Station, Mandsaur. The report of the Police Mandsaur had been sent for and according to it Criminal Case No. 57 of 1968 for offences punishable under Sections 120, 420 and 406 Penal Code had been registered, but on investigation no offence was made out and hence a final report had been submitted before the Court and it had been accepted by the Court on 29-1-1977. The complainant Dharamchand, however, had not protested before the Court against the accepting of the final report. In these circumstances after the final report having been accepted the complaint was not entitled to be continued.

(2) According to the complaint with reference to the consents of the sale deed dated 2-12-1967 the accused Nos. 5, 6 and 7 (Subodhkumar, Suryakant and Shrikant) are buyers. Hence against them no offences punishable under Sections 406 and 420 Penal Code are made out because the buying has been done by a registered sale deed. In the same way against the accused No. 4, Raiaram Gupta

also there is no offence made out because about him the only allegation is that he is the father of the accused Nos. 5, 6 and 7 (Subodhkumar, Suryakant and Shrikant), the buyers. In my opinion, no offences punishable under Sections 120B, 420 and 406 Penal Code are made out against the accused Nos. 4 to 7 (Raiaram Gupta, Subodakumar, Suryakant and Shrikant).

(3) According to the complaint and the deposition of the complainant Dharamchand, the accused Nos. 1 to 3 (Madanlal, Jagdishsingh and Fatehsingh) were the trustees of the registered company and they in the capacity of the trustees had sold the property after passing a resolution illegally. If they are so, they ought to have been proceeded against either under the M P. Trusts Act or the Indian Companies Act, If the sale deed is illegal, there should be an institution of proceedings in a civil Court. From the contents of the complaint and the deposition of Dharamchand it does not appear how the accused Nos. 1 to 3 have committed offences punishable under Sections 420 and 406 Penal Code particularly when the registered sale deed regarding the transaction has been produced.

(4) The complaint purports to be preferred at the instance of Dharamchand and Bapulal but it is not signed by the co-complainant Bapulal. In para 2 of the complaint, it has been described that the complainant is the president of the Mandsaur Shareholders Association but it has not been specified which of the two complainants is the president, nor has any record been produced showing who is the president.

It was for these foregoing reasons that the learned Chief Judicial Magistrate purporting to act u/s 245(2) Criminal Procedure Code discharged the accused persons of offences punishable under Sections 120B, 406 and 420 Penal Code, He also added that the complaint for the offence punishable u/s 406 Penal Code was time-barred (by virtue of Section 468 Criminal procedure Code) because the offence allegedly had taken place on 20-12-1967 and the present complaint had been preferred on 12-3-1977. These apparently appear to be good reasons for discharging, at any rate, the accused-petitioners but one of the reasons for setting aside the order of the Magistrate weighing with the learned Judge of the revising Court was that there was no material on record for the learned Magistrate to later on revise his own order and discharge accused-persons without specifically holding that the charges were groundless.

It is true as the narrative of facts indicates that the learned Magistrate had taken cognizance of the offences punishable under Sections 120B, 406, 420 and 107 Penal Code on 27-4-1977, but it is not true as was argued before the learned Revising Court by the learned Counsel for the complainant that only a few months later without any new circumstances the Magistrate had come to discharge the accused. He had done so after a lapse of almost one year and in changed circumstances.

Numerous decisions have been cited regarding the powers of discharging an

accused under Sub-section (1) of Section 245 and Sub-section (2) of Section 345 Criminal Procedure Code. I cite only a few of them. In the case of Mansoor Shah Vs. Maya Shankar and Another, decided by Dixit. J. (as he then was), Mansoor Shah had preferred a complaint before the City Magistrate, Lashkar alleging that Maya Shankar and Jhanman Lal had committed offence punishable u/s 500 Penal Code. All the witnesses for the complainant in that case were examined but one Virendrasingh, who though had been summoned did not appear on 15-11-1950. The learned Magistrate without taking any steps to secure the attendance of the witness Virendrasingh discharged the accused persons on the basis of evidence adduced by other witnesses. The complainant then sought the revision of that order by the Sessions Judge, Gwalior, who concluded that u/s 253(2). the Magistrate was empowered to discharge the accused at any stage of the case without examining the complainant's witnesses. The complainant thereupon sought to have the order of the Sessions Judge revised, and Dixit J. (as he then was) referring to K. Abdul Salam Sahib Vs. Batchu Veerabhadraraju, pointed out that "while under the first sub-section, the discharge is on the ground that no case has been made out, under the second sub-section, the discharge is on the ground that the charge against the accused is groundless. TO say that no case is made out, is not the same thing as saying that the charge is groundless The first sub-section obviously contemplates the taking of all the evidence referred to in Section 252. Sub-section (2) deals with cases in which the complaint appears to be so groundless "ab initio" or after some witnesses of the complainant have been examined that the examination of or any of the remaining witnesses for the prosecution cannot materially help the case of the complainant." (Reference in fact appears to be to Section 253 Clause (1) in the context of Section 252). In that case, however, the Magistrate u/s 252(1) of the old Code had taken all evidence produced by the complainant in support Of the prosecution and thereafter he had also issued summons u/s 252(2) of the old Code to Virendrasingh to give evidence for the complainant. It was in these circumstances that Dixit, J. came to hold that the Magistrate could not discharge the accused persons without examining the witness so summoned unless he came to a conclusion that even with the evidence which was to be given by that witness the charge would be groundless. He also concluded that the order of the Magistrate discharging the non-applicants is obviously not under the second part of Section 253 Cri. P. C. The ratio decidendi of that case is, and I quote Dixit, J. : "In my opinion, when a Magistrate has taken u/s 252(1) all the evidence produced by the complainant in sunport of the prosecution and then he has also issued summonses u/s 252(2) to witnesses to give evidence for the prosecution, he cannot discharge the accused persons without examining the witnesses so summoned unless he comes to a conclusion about the evidence which is to be given by those witnesses and finds that even if that evidence is recorded, the charge would be groundless." The decision in short is not an authority for supporting the proposition that the Magistrate does not have power to discharge an accused u/s 245(2) Cri, P. C. provided the conditions specified therein are satisfied,

The strongest of the cases, however is per Joshi J. in *Shah Jethalal Lalji Vs. Khimji M. Bhujpuria*, , where it was laid down that having taken cognizance and issued the process it is incumbent upon the Magistrate to record the evidence of the complainant and of such witnesses as he may like to examine or some of them before resorting to Section 253 (2) of the Cr. P.C. 1898, and dismissing the complaint and discharging the accused. He, however, observed that for coming to the conclusion that the charge is groundless there must be some material before him. He cannot simply by going through the complaint and hearing the arguments make up his mind. He then comparing the provisions contained in Section 203 on the one hand and in Section 253, Sub-sections (1) and (2) on the other hand concluded that "it would be thus clear from the scheme of this Chapter and the provisions of various sections that after the stage u/s 203 is passed, but some evidence has been recorded and before all the evidence is taken down the Magistrate in a given case can discharge the accused u/s 253(2).

But the learned Judge has himself noted the decisions to the contrary in *Fazlar Rahaman and Others Vs. Emperor*, , *Shiva Datta v. B.K. Sood* AIR 1940 Lah 40 : 1940 41 Cri LJ 354. and *Sundar Das Loghani Vs. Fardun Rustom Irani*, . which he distinguished on facts. The terms of the section : "nothing in this section shall be deemed to prevent a Magistrate from discharging the accused from any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless" make it abundantly clear that there is no impediment coming in the way of the Magistrate from discharging the accused at any previous stage of the case, provided he for reasons which he has to record considers the charge to be groundless. He. of course is not expected to blow hot and cold in the same breath. He has not to be whimsically vacillating. He has to have some evidence either oral or documentary or some material intervening the stages of Sections 203 and 245(2) Criminal Procedure Code to justify his discharging of the accused.

It has to be remembered that the proceedings (contained in Sections 200 and 204 Criminal Procedure Code) about taking cognizance of an offence, examination of the complainant and his witnesses on oath, the consideration of their statements and the conclusion that there is sufficient ground for proceeding against the accused are all ex parte, whereas the proceedings after the appearance of the accused before the Magistrate become bi-party where the Magistrate obviously has the advantage of knowing his (accused's) part of the story also and hence the salutary provision contained in Section 245(2) Criminal Procedure Code. If it were not so Section 245(2) Criminal Procedure Code would be rendered superfluous. (See *Bhanwarlal v. Kishorilal* 1977 Cri LJ 14351 (Raj).)

In *Sundar Das Loghani Vs. Fardun Rustom Irani*, where a Magistrate after examining the complainant on his complaint had directed the appearance of the accused before him and after hearing both the complainant and the accused and examining certain documents without taking any Oral evidence of the complainant or his witnesses considering that the complainant had deliberately

suppressed several facts and that he was a thoroughly dishonest, fellow had discharged the accused, on revision the High Court had held that the order discharging the accused was legal and within the Magistrate's jurisdiction. (See also Gava Gir v. Vishws-nath Pandey 1954 All LJ 186 and Vishwanath Tiwari v. Lal Behari Mehrotra 1963 All LJ 919.)

The matter appears to have been put at rest by the decision of their Lordships of the Supreme Court in Cricket Association of Bengal and Others Vs. State of West Bengal and Others, . Their Lordships at. page 1929 (of AIR) : (at p. 1436 of Cri LJ) in the concluding part of para 13 after quoting Section 253(1) Criminal Procedure Code laid down as follows:

This sub-section gives ample jurisdiction to the Magistrate to discharge an accused in the circumstances mentioned therein and the order of discharge can be passed at any previous stage of the case. Sub-section (1) under those circumstances will not operate as a bar to the exercise of jurisdiction by the Magistrate under Sub-section (2). It is under Sub-section (2) of Section 253 that the Magistrate has discharged the accused. He has given good reasons in the order for discharging the accused.

The learned Counsel for the petitioners has referred me to annexure 2, the trust deed running into 72 pages, annexure 3 - the copy of the plaint in civil suit No. 3 of 1958 in the Court of the Additional District Judge, Ratlam sitting at Mandsaur, annexure 4 copy of the judgment, annexure 5 copy of the compromise decree in civil suit No. 3 of 1958, annexure 6 - the balance-sheet, annexure 7 - the notice published in the newspaper "Nai Dunia" dated 15-11-1967 regarding the holding of extraordinary meeting of the debenture holders of the company, annexure 8 the proceedings incorporating the minutes of the extraordinary meeting, annexure 9 the sale deed and other annexures (Ex. P. 10 to Ex. p. 17), the copies concerning other litigations. He has also addressed me in detail regarding the entire history of the case leading to the prosecution of the Petitioners culminating in a final report being submitted by the concerned police and also the dismissal of a previous similar complaint resulting in the accused-petitioners being discharged earlier. The respondents have not challenged these documents.

The sum and substance of the address by the learned Counsel for the petitioners is that way back on 29-11-1944 the Board of Directors of Gwalior Maize Product Ltd. Mandsaur had passed a resolution securing a loan of Rs. 3 lacs by issuing, to begin with, mortgage debentures at the rate of six per cent interest. The necessary permission under the Gwalior Defence Rules had been obtained on 24-2-1945 and pursuant to it debentures were finated and on 3-12-45 the trust deed (annexure 2) had come to be executed. The respondents Nos. 3 and 4 - Jasdishsingh and Fatehsingh are trustees under this deed. One Madanlal (since dead) was also a trustee. The trustees got into possession of the property on 27-8-1954 and on 31-12-1954 the petitioner No. 1 Raja-ram initially took the property on lease for six months in consideration of Rs. 13,500/-. On 30-7-1958 trustees filed a suit (No. 3 of 1958) (annexure 3) in the Court of the Additional

District Judge, Ratlam against the petitioner Rajaram but it resulted in a compromise between the parties allowing the petitioner Raiaram to run the company as a tenant at the rate of Rs. 2916/- per month up to 30-6-1962. In the meantime on 27-4-1962, an application for adjustment was made and the lease was extended up to 30-6-1968 at the rate of Rs. 3300/- per month. On 15-11-1967 notice in Nai Dunia newspaper regarding the meeting of the debenture holders to be held on 14-12-1967 was published. Then it was resolved that the property be sold beyond Rs. seven lacs. There were even offers of Indian Trading Corporation. Bombay for Rs. 5,50,000/- and of Bhanwarlal and Company for Rs. five lacs. Ultimately on 19-12-1967. the sale deed (the buyer being Rajaram) came to be executed for Rs. 7,50,000. It was confirmed by the Company Law Court and the necessary certificate from the Income Tax Department was also obtained.

Thereupon one Mohansingh filed civil suit on 18-12-1970 for declaration that the sale was illegal. On 12-1-1971, Dharamchand, the respondent No. 1 successfully applied for being made a party and this suit came to be dismissed on 13-8-1976 but the respondent Dharamchand did not prefer any appeal. In the meantime someone had filed complaint also. Fatehsingh, the respondent No. 4 had also filed a civil suit No. 11-A of 1967 for restraining the debenture holders from holding a meeting. Though an injunction, to begin with, was issued, but it was later on finally vacated. This narrative of facts particularly when it is not controverted, does justify the order of the Magistrate discharging the accused-petitioners.

It appears that the argument advanced on behalf of the complainant that other offences with the help of Section 120B had been prima facie made out, had also weighed with the learned Judge of the revising Court for setting aside the Magistrate's order. "Criminal Conspiracy" is constituted when two or more persons agree to do or cause to be done - (1) an illegal act or (2) an act, which is not illegal by illegal means but no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof, although it is immaterial whether the illegal act is the ultimate object of such agreement or merely incidental to that object. (See Section 120A Indian Penal Code with its explanation).

No doubt the mere act of engaging in an agreement to do an illegal act is an overt act, and the word "act" also includes an illegal omission. The overt acts constituting a conspiracy are acts either (i) signifying agreement, or (ii) acts preparatory to the offence and (iii) acts constituting the offence itself. The gist of the offence of conspiracy, therefore, lies in forming the scheme or agreement between the parties. The external or overt act of the crime is concert by which mutual consent to a common purpose is exchanged. It therefore, suffices if the combination exists and is unlawful. [See also Lennart Schussler and Another Vs. The Director of Enforcement and Another, .]

From the contents of the complaint and the ex parte statement on oath on record particularly in the context of the uncontroverted evidence contained in the documents including the registered sale deed implying ,the notice of sale to the world at large particularly taking into account the possible ages of the petitioners Subodhkumar, Suryakant and Shrikant at the time of the alleged transactions, there does not appear to be any evidence regarding the alleged conspiracy among the petitioners (along with others) to perpetrate the offences in question. Merely the allegation of conspiracy, without any evidence signifying the agreement itself or acts preparatory to the offences or acts constituting the offences, itself is not enough,

The final reason appearing to weigh with the learned Judge of the revising Court is that the Magistrate had not used the word "groundless" as such. No doubt the Magistrate has not used the word "groundless" appearing u/s 245(2) the translation of which in Hindi would be "Adharrahit" but there is no doubt that it is implicit in the order itself that he had considered the charge against the accused-petitioners to be groundless.

To conclude, the Order of the Additional Sessions Judge of the 7th December. 1981 quashing the order of the Chief Judicial Magistrate in Criminal Case No. 844 of 1977 dated 6-3-1978 is set aside. The learned revising Judge could only have directed the Magistrate to conduct further inquiry but could not have directed him to possibly frame a charge u/s 409 I.P.C. The terms of Section 245(2) Criminal Procedure Code being wide enough, it was not legally mandatory on the part of the Magistrate to record yet further evidence particularly when he had heard the parties before him at length with reference to numerous documents which ultimately led him to discharge the accused. The order of the Chief Judicial Magistrate dated 6-3-1978 is restored.