
(2003) 05 PAT CK 0075
In the Patna High Court
Case No : Cr. Misc. No. 4821 of 2000

Rajendra Lal Das and Others

APPELLANT

Vs

The State of Bihar and Nalin Kumar Das

RESPONDENT

Date of Decision : 22-05-2003

Acts Referred:

Citation : (2003) 05 PAT CK 0075

Final Decision : Allowed

Judgement

Prabhat Kumar Sinha, J.—A complaint was filed by opposite party No. 2, Nalini Kumar Das which underwent enquiry u/s 202 of the Code of Criminal Procedure ("the Code", in short) and, on considering the materials on record, the learned Judicial Magistrate at Jhanjharpur by order dated 2.4.1998 dismissed the complaint u/s 203 of the Code against which Criminal Revision No. 565 of 1998 was preferred in the court of Sessions Judge, Madhubani which court heard the Petitioners and by order dated 27.4.1998, under the provision of Section 398 of the Code, set aside the order of the Magistrate, allowed the revision and issued a direction to make further enquiry. Against that order the instant application u/s 482 of the Code was preferred which came up for hearing before a single Judge of this Court on 4.7.2001. The sole point that was urged was that the revision by the Sessions Judge was heard and disposed of without giving any opportunity to the instant Applicants (accused in the complaint) to be heard, hence was not sustainable under law, for which contention reliance was placed on two decisions of this Court, both decided by single Judge, in the case of Sayeed Bhagat and Others Vs. State of Bihar and Another, and in the case of Most. Malti Sah v. State of Bihar 2000 (1) PCCR 197. P.K. Deb, J. who had heard the petition, also noticed another decision by a single judge of this Court in the case of Raj Narain Verma v. Rakesh Kumar Singh 2000 (1) All PLR 701 in which it was held that at the time of enquiry u/s 202 of the Code of Criminal Procedure the accused persons had got no right to be heard. Noticing the provisions u/s 398 of the Code and the fact that the, decisions upon which reliance was placed by the Petitioners did not relate to Section 398 of the Code, his Lordship referred the matter to a Division

Bench, formulating a question of law as under-

Whether in a revision u/s 397 of the Code of Criminal Procedure against the dismissal of a complaint recorded u/s 203/204 of the Code of Criminal Procedure the accused persons could have any right to be implicated and whether opportunity should be given or not of being heard.

2. Arguments on behalf of the Petitioners, opposite party No. 2 and on behalf of the State, opposite party No. 1, have been advanced on the sole question formulated, as above.

3. Sri Kanhaiya Prasad Singh, learned Counsel for the Petitioners, argued that under Sub-section (2) of Section 401 of the Code no order could be made to the prejudice of the accused or any other persons unless he has had an opportunity of being heard either personally or by pleader in his defence. Sri Singh has relied upon certain decisions to reinforce the argument. The decision of the Supreme Court in the case of Bhagirath v. Kana Ram 2000 (2) PCCR 441 was also pointed out. In that case an order was passed by the Rajasthan High Court, without hearing the accused, that cognizance should be taken for the offence committed u/s 307 of the Penal Code. Their Lordships of the Supreme Court also noted that against the order of the Magistrate not taking cognizance u/s 307 of the Indian Penal Code the State of Rajasthan had moved the High Court which application was dismissed earlier by order dated 21.11.1996. In that context their Lordships held that order dated 6.11.1997 should not have been passed without giving opportunity to the accused of being heard. That decision, however, is not applicable in the facts of the case and otherwise also Section 398 of the Code was not involved in that case. A decision of a single Judge of this Court in the case of Sayeed Bhagat and Others Vs. State of Bihar and Another, was also placed into service in which case the Magistrate had ordered summoning of only four, out of nine, accused arraigned in the category of accused in the complaint. After examination of two witnesses a petition u/s 319 of the Code was filed for summoning the remaining five accused which was dismissed by the Magistrate concerned. Against that the complainant moved in revision and the revisional Court by order dated 3.12.1998 set aside the order of the learned Magistrate without issuing notice to the affected persons. In that situation, basing the order upon a decision by Delhi High Court in the case of Mohd. Afzal Vs. Noor Nisha Begum, , it was held that though jurisdiction of the Court to summon a person u/s 319 of the Code could not be questioned, yet the revisional court should have heard the accused before passing the impugned order. However, in this matter also the application of Section 398 of the Code was not involved.

4. The judgment of the Delhi High Court in the case of Md. Afzal (supra) related to a case in which the complaint, after enquiry was dismissed which order was challenged before the court of sessions in revision. The revisional court set aside the impugned order with direction to the lower court to summon the accused. Taking into consideration provisions of Sections 399 and 401 of the Code it was held that a Sessions Judge enjoyed the same powers in a revision as that of a

Judge of the High Court as enshrined u/s 401 of the Code. Taking note of Sub-section (2) of Section 401 of the Code his Lordship of the Delhi High Court held that no order to the prejudice of an accused or any other person could be made unless the said accused or the said person had been given an opportunity of being heard. The petition, thus, succeeded. Another decision of this Court in the case of *Most. Malti Saha v. State of Bihar* 2000 (1) PCCR 197 was also placed by Sri Singh, decided by a single Judge of this Court in which reliance was also placed upon the case of *Md. Afzal*. In that case also in the revision against dismissal of complaint, after enquiry, the revisional court set aside the order of the Magistrate without giving the accused opportunity to be heard. That was held bad in law, also holding that provision contained u/s 403 of the Code that no party had right to be heard in a revision, was an exception to the general rule that no one should be condemned unheard. His Lordship also noticed, in that connection, the provision under Sub-section (2) of Section 401 of the Code.

5. When confronted with the argument of the opposite parties that in none of those judgments the specific provision u/s 398 of the Code were taken into account, Sri Singh argued that the proviso to Section 398 of the Code also provided that no court shall make any direction under this section for enquiry into the case of any person who had been discharged unless such person had an opportunity of showing cause why such direction should not be made. Relying upon a decision of this Court in the case *Chiranji Lal v. State of Bihar* 1978 BLJ 710 by a single Judge of this Court, it was argued that a dismissal of a complaint u/s 203 of the Code amounted to discharge of the accused. It was, thus, pointed out that in view of this decision the dismissal of complaint would be deemed to be discharge of the accused and the issuance of notice to him in a revision u/s 398 of the Code would be a must in the case of dismissal of the complaint u/s 203 of the Code.

6. Lastly, citing various decisions learned Counsel submitted that it was a postulation of natural justice that no one should be condemned by a court without giving an opportunity to that person of being heard. Sri Singh argued that principle of *audi alteram partem* was the sole of the judicial system in this country. It was submitted that it was this principle which had been incorporated by the law makers in the shape of Sub-section (2) to Section 401 of the Code which is the law in general in connection with revisions. Therefore, On this principle also the impugned order, should be held to be illegal.

7. On the other hand, the argument of Sri G.P. Jaiswal learned Additional. Public Prosecutor was that the accused having no locus-standi in course of enquiry u/s 202 of the Code, could not be said to be a necessary party if, the complaint was dismissed and a revision was filed. It was argued that a revision against an order of dismissal of complaint could only be filed under the provisions of Section 398 of the Code which does not provide for any notice to the accused for being heard.

8. learned Counsel for opposite party No. 2, the complainant, submitted that by a single Judge of this Court in the case of *Dr. Kumar Kishore Mandal v. Kamal*

Deva Thakur 1986 PLJR 21, it was held that a revision petition for further enquiry could be disposed of by the court of sessions ex-parte, filed against dismissal of complaint u/s 203 of the Code. It was argued that in the aforesaid case it was also held that in a case of discharge u/s 245 or 249 of the Code notice had to be issued to the accused before the matter was finally decided.

9. Before further proceeding with the matter it may be mentioned that the same matter had come up for consideration before a Division Bench of this Court in the case of Sheo Narain Singh and Others Vs. Ram Pertap Rai, In that case the complaint was dismissed u/s 203 of the Code which order, however, was set aside by the court of sessions ordering further enquiry u/s 437 of the Old Code (corresponding to Section 398 of the Code). In that case the Sessions Judge had issued no notice to the accused and that order was mainly assailed on that ground. Their Lordships, relying upon a decision of the Full Bench of the Calcutta High Court in the case of Hari Das Sanyal v. Saritulla (1888) 15 Cal 608 (F.B.), held that in case of dismissal u/s 203 of Section 204(3) notice to the other side was not desirable. It was noticed that Hon"ble the Chief Justice of the Calcutta High Court in the case of Hari Das Sanyal had observed that no notice would be necessary in case of a complaint dismissed u/s 203 where accused person had not appeared or was not summoned to appear before the Magistrate and made a distinction between discharge of an accused u/s 253 of the Old Code (which was the matter involved in that case) and a dismissal of complaint u/s 203 of the Code. In the case of Sheo Narain (supra) their Lordships also observed as follows:

It seems to us illogical that an accused should not be allowed to appear in proceedings u/s 202 (and this is the settled practice of this Court frequently and forcefully said down), but that he should be allowed to appear in proceedings purporting to revise proceedings u/s 202 and that if under that section the proceedings are continued he should again be precluded from appearing.

10. No coming to section 398 of the Code which runs as follows:

398. Power to order inquiry. 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 Magistrates 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.

11. Sri Kanhaiya Prasad Singh, learned Advocate who later argued that dismissal of a complaint u/s 203 of the Code amounted to discharge of the accused in view of the decision in the case of Chiranji Lal (supra), had placed a decision of the Himachal Pradesh High Court in the case of Krishan Lal Vs. Sh. Ghaniya and

Others, in which in an application filed u/s 482 of the Code it was held that in view of specific provision of Section 398 of the Code it was not open for the complaint to invoke the inherent powers of the Court u/s 482 for a direction to be issued as contemplated u/s 398 of the Code. This argument was quite distinct from the argument of the learned Counsel made earlier with regard to Section 401 Sub-section (2) of the Code.

12. The decision in the case of Chiranji Lal was altogether in different context. In that case cognizance of the offence was taken upon a complaint filed by an official, and summons was issued to the accused who appeared before the court of Judicial Magistrate and prayed for acquittal as the complaint disclosed no offence which prayer was allowed. The State moved in revision in which the court of sessions set aside the order. It was noted in that judgment in a passing way that effect of dismissal of complaint in a summons case would be discharging the accused. In this decision the scope of Section 398 of the Code was not in issue. In that case order was passed after the accused had already appeared in the lower court.

13. If dismissal of a complaint had the effect of discharge of an accused, there was no need to lay down in the proviso to the section that no court shall make any direction for enquiry into the case of any person who had been discharged, unless such person had an opportunity by showing cause as to why such directions should not be made. The first part of this section empowers the High Court and a Sessions Judge to direct for making enquiry 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." (emphasis added). This distinction between the dismissal of complaint and discharge of an accused has a rationale behind it. In the case of discharge whether u/s 245 or u/s 249 of the Code, the accused has appeared in a criminal case and has been discharged after such appearance. A party who is not being tried for an offence is not an accused person which is the view also approved in the case of Sheo Narain (supra). Therefore, when a person has been discharged after his appearance in the court, notice must issue to him in a revision preferred against order of his discharge but the same cannot be the case when a complaint is dismissed, for the reason that till accused is summoned, he has no locus-standi in the case whether in course of enquiry or in a revision preferred against dismissal of the complaint. That the accused has no locus-standi in course of enquiry is well established law see Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, and Chandra Deo Singh Vs. Prokash Chandra Bose and Another,

14. The doctrine of audi alteram partem which is a general principle will not be applicable in a revision u/s 398 of the Code. Like any other general principle this also must make room for an exception expressly provided under the Statute.

15. In so far decision of the Delhi High Court in the case of Md. Afzal is concerned, another decision of the same court in the case of A.S. Puri Vs. K.L.

Ahuja, also by a single Judge of that court, may be referred to. In that case the court of sessions, in revision, had ordered issuance of notice only to the State against dismissal of the complaint but the office, however, issued notice to the accused also and the accused appeared and was allowed to be heard. A point was raised that the accused should not have been heard. His Lordship, referring to the decision in the case of Hari Dass Sanyal of the Calcutta High Court, Full Bench (*supra*) in which it was held that though there was no legal necessity to issue notices to the accused in point of law before disposing of such a revision petition and ordering a further enquiry, as a matter of discretion it was proper that such a notice was given, held that in any case nothing prevented the learned Additional Sessions Judge from hearing the accused for it was his discretion to hear him. Therefore, this decision also does not endorse the view that legally it was essential to issue notice to the accused while hearing such a revision petition, though the revisional court had discretion to hear the accused also.

16. That a revisional court has this discretion is manifest from the provision u/s 403 of the Code. This section states that save as otherwise expressly provided by this Code, no party has any right to be heard either personally or by pleader before any court exercising its power of revision, but the court may, if it thinks fit, when exercising such powers, hear any party-either personally or by pleader.

17. In view of what has been discussed aforesaid in the context of provisions u/s 398 of the Code, I am of the opinion, and hold, that while exercising power of revision against dismissal of a complaint u/s 203 or under Sub-section (4) of Section 204 of the Code, there is no legal necessity to issue notice to the accused while issuing direction for further enquiry. However, if the court so feels it proper while exercising such power, it may hear the accused under the provisions of Section 403 of the Code, which is discretionary power.

18. In the case of Md. Afzal (*supra*) and Mosst. Malti Saha (*supra*) the provisions u/s 398 of the Code have not been taken into consideration which is the specific provision to be invoked for filing a revision against dismissal of a complaint, as aforesaid. I am, therefore, in respectful disagreement with the ratio said down in the case of Md. Afzal and am also of the opinion that the decision of this Court in the case of Mosst. Malti Saha does not lay down correct law, in so far application of these two decisions in a revision filed u/s 398 of the Code is concerned.

19. There is no merit in the application and the same stands dismissed.

20. In view of seeming conflict in decision of the Courts as to whether an accused, sought to be put on trial, has a locus standi to be heard by issuance of a notice in the revisional proceeding, a learned single Judge of this Court wished the matter to be referred to a Division Bench and it is how that the matter has come before us.

21. I have the privilege of going through the judgment prepared by the esteemed colleague Brother P.K. Sinha, J. In the judgment, facts as well as

relevant provisions of law and the details on the subject have been very elaborately and lucidly discussed. Hence, it would not be necessary to go into these details all over again. Since we have not found merit in the case of the Petitioners before this Court, I do not consider it necessary to dwell upon the question on facts stated in the petition of complaint and in the statement of witnesses recorded u/s 202 of the Code of Criminal Procedure (Cr.P.C.), scope of inquiry u/s 202 Code of Criminal Procedure being extremely limited-limited only to ascertainment of truth or falsehood of allegations made in the complaint. While exercising jurisdiction vested u/s 482 Code of Criminal Procedure the High Court should not embark upon an inquiry whether the allegation in the complaint are likely to be established or not and also in view of mandate of Section 403 Code of Criminal Procedure it is not incumbent on the revisional court to issue notice to the accused person against whom complaint stood dismissed u/s 203 Code of Criminal Procedure Looking from another angle too, it looks quite illogical to get persuaded to succumb to the view that an accused, who is not allowed to participate in a proceeding u/s 202 Code of Criminal Procedure should be allowed to resist the proceeding while the Court is exercising revisional jurisdiction. However, we need not detain ourselves to deal with this issue which has been reiterated time and again and has almost been set at naught that under the provisions as contained in Section 403 Code of Criminal Procedure in a revisional proceeding, no party has any right to be heard, is an exception to the general rule that no one should be condemned unheard.

22. I, therefore, append my full agreement with the conclusion find judgment of Brother P.K. Sinha, J. on all points.