

(1951) 01 GUJ CK 0002
In the Gujarat High Court

Case No : Criminal Revision Application No. 44 of 1950

Senta Ajamkhan Bambhaniyabhai and Another	APPELLANT
Vs	
Bai Alambu Sardarkhan	RESPONDENT

Date of Decision : 17-01-1951

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 202, 202(2A), 203, 494, 96
Penal Code, 1860 (IPC) — Section 403, 404

Citation : (1951) 01 GUJ CK 0002

Hon'ble Judges : Shah, C.J;Chhatpar, J

Bench : Division Bench

Advocate : G.B. Joshi, for the Appellant; C.N. Shah, General for State and H.I. Bhatt, for the Respondent

Judgement

1. This is a revn. appln. against the order of the Ses. J., Gohilwad Division, ordering further enquiry into the complaint filed by the opponent against the appcts. The Opponent the Alambu Sardarkhan is the widow of Alibhai, who died about 8 or 9 years back leaving a mother Faiba. Faiba lived in Alibhai's house at Lathi, & died about 4½ years back, & on her death Alambu with her step daughter Zubeda went to live with her father at Bhavnagar. Applicant 2, Bai Zezadi is the sister of Alibhai, & appct. 1, Senta Ajamkhan is her husband. The complaint filed by Alambu charged the appcts. with dishonestly appropriating Alibhai's property by removing it from his house, & thereby committing an offence u/s 404, I.P.C. The First Class Mag. examined the Opponent Alambu & granted a search warrant u/s 96, Cr.P.C., but instead of issuing process he issued a notice against the appcts. to show cause why process should not issue against them. The appcts. appeared in response to the notice, & the Learned Mag.

then heard the arguments off the opponent's pleader & of the pleader for the appcts. & took the view that the allegations made in the complaint were vague & improbable, that the complaint was filed after a lapse of years & that there was no "prima facie" case to hold that the opponent (sic) had dishonestly removed the property of Alibhai. He was also of the opinion that the dispute was of a Civil nature & on these grounds he dismissed the complaint u/s 203, Cr.P.C.

2. The Opponent applied in revn. to the Learned Ses. J., Gohilwad Division, who found that the Learned Mag. had committed an irregularity in.

issuing a notice to the appcts., that he ought to have given an opportunity to the complainant, to adduce evidence in support of her allegations, &

that the order of dismissal passed without giving such opportunity was bad, & he, therefore, ordered further enquiry into the complaint.

3. u/s 202, Cr.P.C. it is in the discretion of the Mag., for reasons to be recorded in writing, to postpone the issue of process against the persona

complained against, & he may either enquire into the case himself, or direct enquiry or investigation to be made by any Mag. subordinate to him or

by a police Officer, or by such other person, as he thinks fit, for the purpose of ascertaining there truth or falsehood of the complaint. Under Sub-

section (2A), the Mag. inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath. It was argued at the outset

by the Learned Advocate General that the action of the. Learned Mag. in issuing a notice against the appcts. to show cause why process should

not be issued against them was illegal as being contrary to the requirements of Section 202, Cr.P.C. The decisions of the various H.Cs. on the

question raised are not uniform. On facts somewhat similar the Bombay H.C. has held in "In re Virbhan Bhagaji" AIR (15) 1928 Bom 290, that

the action of the Mag. in issuing a notice to the accused was not illegal. Even so, the practice was not deemed to be desirable. The other H.Cs.

have held differing views, but the consensus of opinion definitely is that the practice of conducting the enquiry in the presence of the accused, & of

allowing the accused to be represented by lawyers & to contest the complaint on the merits is highly irregular & undesirable. In our view, the

scope of the enquiry under the section is restricted only to the ascertainment of the truth or falsehood of the complaint, & the Inquiry is not to take

the place of a full dress trial. Therefore even though the issuing of a notice to the accused in this case & of the hearing the pleaders of the parties

was not illegal, it was highly irregular. The practice of issuing a notice to the persons complained against is undesirable & we discourage it.

4. The Learned Mag. has here enquired into the case himself instead of directing an enquiry to be made by a Police Officer, & the enquiry which

he has made consists of hearing the pleaders for either party, & forthwith coming to certain conclusions, & on the strength thereof dismissing the

complaint u/s 203, Cr.P.C., & the question is as to whether the procedure adopted by him does really amount to an enquiry contemplated by

Section 202. The averments in the complaint appear to have been denied by the persons complained against, & in that case it was all the more

necessary to give the opponent an opportunity to support the averments & to explain or to meet the averments made by the other party. The

Learned Mag. here has not given any opportunity whatever to the respondent to support by "prima facie" evidence, the allegations made in the

complaint. In fact, he has not examined the complainant, nor has he given her an opportunity to call evidence to prove such a "prima facie" case, &

what he has done is simply to hear the pleaders appearing on either side, & to draw his own conclusions from the arguments addressed by them.

5. Mr. Joshi for the appcts. cited the decision in Ramanand Lal Vs. Ali Hassan and Others, , & urged that the enquiry by the Mag. under the

section did not necessarily mean an enquiry by examining witnesses or by holding an investigation into the case, & it was open to the Mag. to

investigate into the matter in order to ascertain the truth or falsehood of the complaint in any way he thought proper. There, the police had instituted

a case on information lodged by the petnr Sub-inspector, but later leave to withdraw the complaint was sought, & the Sub-divisional Mag. having

permitted withdrawal, the accused was discharged u/s 494(a), Cr.P.C. Thereupon the original petnr. filed a complaint before the Sub-divisional

Mag., & the said Mag. ultimately passed an order dismissing the complaint u/s 203, Cr.P.C. after looking into the Police papers. The contention

made was that once the Mag. took cognizance of the offence on the complaint & examined the complainant upon oath, he was bound to issue

process against the accused persons unless he thought fit, for reasons to be recorded in writing, to postpone the issue of process u/s 202, Cr.P.C.,

& in that case, he was required either to enquire into the case himself or direct an enquiry by a Mag. subordinate to him or by a Police Officer or by such other person as he thought fit. It was urged that the Learned Mag. did not hold an enquiry himself, nor did he direct an enquiry as provided for in Section 202, Cr.P.C. The contention was negatived for the reason that it was open to the Mag. to investigate into the matter in order to ascertain the truth or falsehood of the complaint in any way he thought proper, that an investigation had already been made by the police & witnesses had been examined by the investigating Police Officer, & there was nothing in law to prevent the Sub-divisional Mag. from looking into the papers for the purpose of ascertaining the truth or falsehood of the complaint. The facts in the present case are entirely different inasmuch as no one was examined by the Learned Mag., & he has merely proceeded to dismiss the complaint on looking into the averments in the complaint & on hearing the arguments of the pleaders. The decision in Ramanand Lal Vs. Ali Hassan and Others, is, therefore, clearly distinguishable. Mr. Joshi also cited the decision in G. Ramchandra Naidu and Others Vs. A. Manu Swamy Naidu, , but the facts of that case too were different. The Sub-divisional Mag. in that case had sent the complaint to a Dy. Collector for enquiry & report, & on receipt of the report, he had first ordered the issue of summons, but, on further consideration, he cancelled the previous order, & stated that he did not find legal evidence connecting the accused with the offence of theft, & further that there was nothing in the report of the investigating Officer to substantiate a case u/s 403, I.P.C, & he therefore dismissed the complaint u/s 203, Cr.P.C. There again the Dy. Collector who held the enquiry had examined the complainant witnesses, & the complainant had been given an opportunity to lead evidence. That factor not being present in this case, the decision cited above is inapplicable. In AIR 1934 88 (Oudh) , it was held that the dismissal of the complainant after merely making some oral enquiries without examining any one on oath was Illegal & irregular.

6. Mr. Joshi has referred to the merits of the case, & has urged that the complaint was on the face of it a false one, was made with ulterior motives, & was filed after a lapse of 3½ years. The issue at this stage is, however, not as regards the merits of the complaint, & the point is whether the

learned Mag. was right in dismissing the complaint without giving a hearing to the opponent. In our view the learned Mag.'s action in dismissing the complaint merely on construing the averments made in the complaint & hearing the pleaders was improper, & did not answer the requirements of an enquiry contemplated by Section 202, Cr.P.C. He ought to have given sufficient opportunity to the complainant to support the complaint by "prima facie" evidence. The learned Ses. J.'s order directing a further enquiry is correct & we see no reason to interfere. The appln. fails & is dismissed.