
(1973) 06 BOM CK 0006

In the Bombay High Court

Case No : Criminal Revision Application No. 1002 of 1972

Shah Jethalal Lalji

APPELLANT

Vs

Khimji M. Bhujpuria

RESPONDENT

Date of Decision : 29-06-1973

Acts Referred:

Penal Code, 1860 (IPC) — Section 34, 408, 420, 500, 501

Citation : (1974) 76 BOMLR 270

Hon'ble Judges : Joshi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Joshi, J.—The petitioner (original complainant) whose complaint has been dismissed, mainly on the ground of want of jurisdiction and being bad in law for misjoinder of charges and persons, by the learned Presidency Magistrate, 22nd Court, Andheri, who consequently discharged the accused, has come in revision.

2. It appears that the complainant, a merchant of status and repute, was the member of Shri Cutchi Visha Osval Deravasi Jain Mahajan, whereas accused No. 1 was its President. Accused No. 3 was the Honorary Secretary and accused Nos. 2, 4 and 5 were the members. There was also another Mahajan, namely, Shri Cutchi Visha Oswal Sthanakvasi Jain Mahajan. The office bearers of the Mahajans of the two communities referred to above, jointly issued an appeal to the members of the communities on January 11, 1972, that more than 650 persons be not fed at the receptions of the marriage ceremonies. This appeal had no legal sanctity. The complainant celebrated his daughter's marriage on May 28, 1972 at the Wilson High School, V.P. Road, Bombay-4 and arranged a lunch between 10 a.m. and. 1 p.m. in honour of the guests on both the sides. It was the allegation of the complainant that accused Nos. 2, 3, 4 and 5 with a group of 160 unknown persons alleged to be the volunteers of the C.V.O. Mahajan, picketed with black flags with intention to defame the complainant and to lower him in the estimate of the society. This move was made with the malicious intention to

harm the complainant's reputation by calling him as "Samajdrohi". Not content with these demonstrations, it is the further allegation of the complainant that in the issue of "Janma-bhoomi" dated May 30, 1972 and C.V.O. News Bulletin of even date, they gave wide publicity to this incident. The reports were caused to be published by accused Nos. 1 to 5. On June 5, 1972, in spite of the notice issued by the complainant to accused Nos. 1 and 2, accused No. 5 as an editor of a monthly magazine "Gyati Patrika" published certain items of news defamatory to the complainant and his guests. The complainant further alleged that accused No. 1 who was the President of Shri Cutchi Visha Osva Deravasi Jain Mahajan, Bombay, failed and neglected in his duty to prevent such harassment and mental agony to the complainant caused by the picketers and publishers of the various news items. Therefore, he filed a private complaint on June 28, 1972 in the Court of the learned Presidency Magistrate, 22nd Court, Andheri, Bombay, indicting all the accused for offences punishable under Sections 500, 501 read with Section 34 of the Indian Penal Code.

3. The learned Magistrate acting on this complaint and on taking cognizance, issued process on June 28, 1972. On October 9, 1972 the accused presented an application praying that the complaint be dismissed and the accused be discharged, as the learned Magistrate had no jurisdiction and even otherwise the complaint was bad for misjoinder of charges and persons. On hearing the arguments of both the sides, but without recording any evidence, the learned Magistrate dismissed the complaint and discharged the accused in view of the provisions contained in Section 253(2) of the Criminal Procedure Code. It is this order which is impugned in revision.

4. Mr. Yennemadi who appeared for the complainant, took a strong exception to the procedure adopted by the learned Magistrate in finding out this shortcut of discharging the accused u/s 253(2), Criminal Procedure Code by skipping over the intervening provisions and the essentials of law finding place between Sections 203 and 253 of the Criminal Procedure Code. A survey of these sections, submitted Mr. Yennemadi, would make it clear that it was open to the learned Magistrate in such cases at initial stages before issuing the process, to discharge the accused. Having taken cognizance and issued the process it was incumbent upon the learned Magistrate to record the evidence of the complainant and of such witnesses as he might like to examine, or some of them before resorting to Section 253, Criminal Procedure Code. To appreciate these arguments, a scrutiny of the relevant provisions would be necessary.

5. Chapter XVI of the Code of Criminal Procedure deals with complaints to Magistrates. u/s 200 a Magistrate taking cognizance of an offence on complaint has at once to examine the complainant and the witnesses present, if any, upon oath and the substance of the examination has to be reduced to writing. This is required to be signed by the complainant and the witnesses as well as by the Magistrate. If the Magistrate is not competent to take cognizance of the case, he has to return the complaint for presentation to the proper Court with an

endorsement to that effect. Pausing here for a while, if the learned Magistrate felt at the initial stages that he had no jurisdiction to entertain the complaint as he now concludes, this was a proper stage for him to return the complaint. u/s 203 one more measure is provided and it deals with the dismissal of the complaint. The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if after considering the statement on oath made by the complainant and the witnesses and the result of the investigation or inquiry, if any, u/s 202, there is, in his judgment, no sufficient ground for proceeding. In such cases he has to record his reasons in brief for dismissing the complaint. The Magistrate obviously, in the present case, has not availed of these provisions. u/s 204 if the Magistrate taking cognizance of an offence is satisfied that there is sufficient ground for proceeding, he can issue a summons or a warrant taking into consideration the nature of the case. It would be clear from a comparative reading of these material sections from Sections 200 to 204 that the first stage in a complaint filed by a private person for its dismissal is u/s 203. A little earlier he has the option to return the complaint for presentation to the proper Court if he feels that he has no jurisdiction. But I would presently point out that once this stage is passed, the next provision for discharging the accused is u/s 253, Sub-section (2). The intervening sections make no provision to enable the Magistrate to discharge the accused.

6. Provisions of Section 253(2) which are a little wider, have been relied upon by both the sides. Sub-section (1) of Section 253 says:

If, upon taking all the evidence referred to in Section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

But this Section postulates the adherence to the provisions contained in Section 252 which casts a duty upon the Magistrate to record the evidence as may be produced in support of the prosecution. Then comes Sub-section (2) which reads thus:

Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

7. Reliance has been placed by Mr. Vepari for the accused while justifying the order of the learned Magistrate that even at a previous stage of a case the Magistrate could discharge the accused. But I am afraid, he is unduly emphasizing the words "previous stage of the case" stripped off the context. This provision appears in Sub-section (2) and it has to be read together with the provisions of Sections 252 and 253(1). As noted just now, u/s 252 the Magistrate has no alternative but to take the evidence in support of the prosecution case, that is to say, he has to hear the complainant, if any, and the other witnesses produced in support of the prosecution. On this background Sub-section (1) in

Section 253 is added, and it is only on the analysis of such evidence the Magistrate can discharge the accused if in his opinion no case is made out against the accused. In that context Sub-section (2) is added. But what is emphasized is that he must in the first instance consider the charge to be groundless. Then only at any previous stage of the case he can discharge the accused. 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. Moreover, that power is given in the context of the two preceding sections i.e. Sections 252 and 253(1). Reading these provisions together it seems to me that the phrase "at any previous stage of the case" has a bearing upon the duty of the Magistrate to take all evidence and it is in juxtaposition of that duty, that Section 253(2) empowers the Magistrate to discharge the accused at any previous stage of the case. It would be thus clear from the scheme of this Chapter and the provisions of the 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). The object appears to be obvious. The Magistrate is under no obligation to burden his record by taking the evidence of all the witnesses which the complainant may desire to examine in a given case. If on the very admissions of the complainant elicited in the cross-examination and a witness or two examined thereafter, create an unforgettable impression upon the Magistrate that it is futile to have the further evidence or on the complainant's own showing that it is a fit case to discharge the accused, or to use the language of Sub-section (1) of Section 253, the evidence is not sufficient to make out a case against the accused, then certainly he can intervene and discharge the accused. The provisions relied upon from Sub-section (2) of Section 253 do not empower the Magistrate to dismiss the complaint and discharge the accused before recording any evidence whatsoever u/s 252 of the Criminal Procedure Code. To take a contrary view, would nullify the statutory provisions contained in Section 203 as well as Sections 252 and 253(1). If the Legislature intended to confer upon the Magistrate such a wide power to dismiss the complaint and discharge the accused at any stage he pleases, there was no necessity of incorporating Section 252. Therefore, on the very plain language of this section, the approach made by the learned Magistrate does not seem to be proper, nor can it be sustained under the law. To my mind, it is *ex facie* illegal and on this score alone, the order will have to be set aside.

8. In this context a reference need be made to certain authorities which take such a view and they are to be found in the cases of: (1) Abdul Nabi Vs. Gulam Murthuza Khan and Another, (2) M.G. Solomon v. Ch. Luke [1963] 1 L.J. 347 (3) Sheriff Sahib v. Abdul Karim Sahib ILR (1927) Mad. 185 and (4) an unreported judgment of this Court in the case of E.G. Merchant v. Himatlal Nagjibhai Khetani (1958) Criminal Revision Application No. 378 of decided by Tarkunde J., on July 7, 1958 (Unrep.). The ratio of these authorities in a nutshell is that where a complaint *prima facie* discloses an offence, a Magistrate cannot discharge the

accused u/s 253(2) without ascertaining from the complainant what is the nature of the evidence his witnesses are going to give and without taking some evidence including that of the complainant.

9. However, Mr. Vepari for opponents Nos. 1 to 3 brought to my notice a couple of authorities which, according to him, take a contrary view. The first case relied upon by him is the case of *Fazlar Rahaman and Others Vs. Emperor*, . In that case the learned Magistrate had issued a process and as the accused remained absent, a proclamation was issued and in response to it the accused appeared and was released on bail. Thereafter, when the matter came up before the Court, the complainant was absent and his learned Counsel informed the Court that the complainant had gone to his native country. The accused who was present in the Court asserted that the complainant was in the Court on the very day. Thereupon the learned advocate for the complainant asked for a month's time and on these facts the learned Magistrate observed, "This is absurd. The accused is discharged u/s 253, Criminal Procedure Code." Against this order the complainant went in revision and a point was made that the order of discharge was bad without taking any evidence. But in the course of the judgment their Lordships have pointed out that the circumstances which led to the discharge of the accused, including the one reproduced above, were by themselves sufficient to hold that the charge was groundless. They observed that the learned Magistrate seemed to have believed that the charge was groundless in view of the absence of the complainant, the statement made by the accused and the submissions made by his advocate. These circumstances were interpreted by the learned Magistrate to mean that the charge was groundless and they thought it not proper to interfere with his discretion. The authority nowhere says that without any evidence or without mentioning the premises as to how the charge is groundless, recourse could be had to Section 253 of the Criminal Procedure Code. In the next case of *Shiv Datta v. B.K. Sood* AIR [1940] Lah. 40 the principle enunciated, strictly speaking, is not contrary to the ratio referred to above. In that case the respondent charged the petitioner u/s 408 of the Indian Penal Code. After examining the complainant, the Magistrate who had taken cognizance of the case issued process for the attendance of the accused and of the complainant's witnesses. At that stage on his appearance the accused put in a petition to the effect that no criminal offence was disclosed and praying for his discharge u/s 253(2). The learned Magistrate refused to accede to such a request inter alia observing that there is no authority shown to the effect that the complaint can be thrown out as groundless without hearing the complainant and his witnesses. He further ordered that the complainant should produce his evidence on the next date and gave a similar opportunity to the accused to keep his evidence ready. This order was impugned in the High Court. To the extent of this observation, said his Lordship Blacker J., who decided the case, that "the order of the Magistrate does not appear to be correct." His Lordship further concluded that he was satisfied on going through the record that it was one of those cases in which the Magistrate could find that the charge was groundless without hearing at least

the complainant. It is only certain ancillary observations which are now relied upon that if, for instance, the admissions of the complainant under examination u/s 252, Criminal Procedure Code, make it clear not only that the facts set forth in the accused's petition are correct but also that, on the basis of those facts admitted by the complainant, no criminal offence has been disclosed, then certainly the Magistrate can say that the process was issued under a mistaken belief that an offence had been disclosed, and he can set himself right. But here again it is worthy to note that the order to be made u/s 253(2) could virtually proceed on some evidence and not otherwise. Lastly, reliance was placed on certain observations in the case of *Sundar Das Loghani v. Fardun Rustom Irani* (1939) 40 Cr. L.J. 658. In that case the facts were somewhat singular. The complaint was lodged on October 17, 1938 against the opponent alleging that he had committed an offence punishable u/s 420 of the Indian Penal Code. The Magistrate examined the petitioner and directed a warrant should issue for the arrest of the opposite party. The opposite party put in his appearance on the next date. On October 28, 1938 the Magistrate heard both the sides, and examined some documents, but he did not take the evidence of the petitioner or any of his witnesses. The Magistrate then, reached the conclusion that the petitioner had deliberately suppressed several facts in his petition of complaint and the complaint was a thoroughly dishonest one. Consequently he discharged the opponent. On this background, while interpreting the expression "at any previous stage of the case" occurring in Section 253(2), their Lordships proceeded to point out that under some such circumstances it would be reasonable that an accused person should be allowed to show that there is no case against him. By way of illustration they further point out that in a given case it may occur to the Magistrate long after the process was issued that the entire case would suffer for want of sanction which would go to the root of the matter. It is only under such exceptional circumstances that Sub-section (2) of Section 253 could be invoked. But nowhere in any of these three cases it has been laid down that the Magistrate is relieved of his duty to take the evidence--may be oral or documentary--to scrutinize the same and to come to a conclusion that the charge is untenable or groundless. It is only on recording such a finding invariably drawn on taking evidence that he can exercise the jurisdiction u/s 253(2). Therefore, on a survey of all these authorities, I am convinced that the view taken in the first four authorities, with which I am in agreement, does fortify the grievances of Mr. Yennemadi for the petitioner and, as observed earlier, the order of the learned Magistrate cannot be sustained.

10. This brings me to the second ground which seems to have weighed with the learned Magistrate, and it is want of jurisdiction. The learned Magistrate on pointing out that the demonstrations at the pandal were held at Girgaum, that the newspapers referred to above were published in different parts of Bombay, observed that the Magistrate having jurisdiction over places where the demonstrations were staged or the papers published, and consequently where there was defamation, will have jurisdiction and according to him those places

would be within the jurisdiction of Courts Nos. 4,9 and 16. By way of illustration he proceeded to observe that if his view was not accepted, he was apprehensive that any person having a cause of action arising within the jurisdiction of Esplanade, and Ballard Pier Presidency Magistrates' Courts, may file the complaint at Mulund or Borivli Court just to harass these opponents. Such apprehensions are purely imaginary and ignore the normal course of human conduct. It is needless to dilate on such hypothetical approaches. In making these observations, I am afraid, the learned Magistrate has not properly construed the provisions appearing in Sections 20, 21 and 177 of the Criminal Procedure Code. Section 177 no doubt says that every offence shall ordinarily be inquired and tried by a Court within the local limits of whose jurisdiction it was committed but Section 20 defines the jurisdiction of a Presidency Magistrate. It says:

Every Presidency Magistrate shall exercise jurisdiction in all places within the presidency-town for which he is appointed, and within the limits of the port of such town....

The learned Magistrate now presiding over Andheri is certainly appointed for this presidency-town and he can exercise jurisdiction in all places within the said town. Section 21 confers upon the Chief Presidency Magistrate certain powers to make rules consistent with this Code to regulate the conduct and distribution of business and the practice in the Courts of the Magistrates of the town. Of course, this has to be done with the previous sanction of the State Government. But this administrative power which is conferred upon the Chief Presidency Magistrate cannot deprive the learned Magistrate of his statutory jurisdiction conferred upon him by Section 20. If needs be, in this context a reference will have to be made to the case of *Emperor v. Khodabux* (1926) 26 Bom.LR 1066. In this case the facts were simple. The applicant, while driving a motor-car along a road in Bombay, committed some offence under the Motor Vehicles Act and it was committed within the jurisdiction of the Girgaum Police Court. But under the orders then prevailing which were issued u/s 21 of the Criminal Procedure Code, the case was taken up by the Chief Presidency Magistrate. His jurisdiction to entertain the case was questioned and the Division Bench of this Court pointed out that u/s 20 of the Criminal Procedure Code a Chief Presidency Magistrate has jurisdiction to try an offence committed in any place within the presidency-town. The administrative convenience or the division of work is no bar to the statutory jurisdiction. Therefore, the learned Magistrate's observations regarding the apprehensions entertained by him do not appeal to me at all.

11. There would be one more aspect which the learned Magistrate seems to have overlooked. The charges are of defamation, defamation by words uttered and written. The newspapers or the magazines might have been printed within the jurisdiction of Courts Nos. 4, 9 and 16. But certainly they were circulated and widely read at Vile Parle, and surrounding places where the complainant and his relatives reside and which are admittedly in the jurisdiction of the Andheri Court,

presided over by this learned Magistrate. In such circumstances, the venue of trial can be either of the Courts viz. the Court within the jurisdiction of which the actual publication was made, or the Court in whose jurisdiction the defamatory matters were posted, circulated or spread. In this view, one is fortified by the observations in the case of *Pisupati Purnaiah Sidhanthi Vs. Pisupati Satyanarayana Sidhanthi*, and *Munithayamma v. Muddobalappa* AIR [1955] Mys. 135. In both these cases a similar point had arisen. In Purnaiah's case on referring to the relevant provisions and the authorities of the different High Courts, it has been pointed out that letters to such newspapers are deemed to be published both where they are posted or printed, and where they are received, opened and read. But without dilating further, I am inclined to hold that, from this point of view also, the Andheri Court will have jurisdiction.

12. There remains the last attack viz. misjoinder of charges and persons. Before touching upon the legal aspect, at the cost of repetition, I may refer to certain averments in the complaint. The charges are under Sections 500 and 501, read with Section 34, Indian Penal Code. It is needless to repeat the particulars of the acts committed by the various accused and the manner in which they and/or their associates are alleged to have defamed the complainant. Accused Nos. 2, 3, 4 and 5 are said to be the conveners of the alleged Marriage Regulation Committee of the C.V.O.D.J. Mahajan, of which accused No. 1 is the President. No doubt, the further allegation is to the effect that accused Nos. 2, 3, 4 and 5 led a group of about 160 unknown persons said to be the volunteers of the C.V.O. Mahajan for picketing the pandal. In para. 7 it is further alleged that all the accused organised or caused to be organised the said picketing with black flags as stated above at the function arranged by the petitioner only and at no other similar functions on the same day arranged elsewhere by "the members of this very community. These averments ex facie implicate accused No. 1 and impliedly curse him as a prime mover. He may not be physically present at the pandal, but it was said by Mr. Yennemadi that his voice pervaded the slogans. In para. 11 it is alleged that accused Nos. 1 to 5 caused to be published the report of the said picketing in "Janmabhoomi" of May 30, 1972 and C.V.O's bulletin of even date. In that context it is further said in the complaint that accused No. 1 as the President of this Mahajan who was in duty bound to protect the petitioner or to arrest such atrocities, failed and neglected in his duty. These allegations, coupled with the evidence which may be led, are likely to spin out a case of abetment by accused No. 1. Notice of the sufferings of the complainant was already issued to accused Nos. 1 and 2. Accused No. 5 was aware of it and even then accused No. 5 as an editor of the magazine "Gyati Patrika" made further publication of these events probably to give a wider publicity in all the regions not only of this State, but of the adjoining States wherever the members of this community resided. Here again, it would be a question of fact whether these writings either in the newspapers or the magazine were at the instance of accused No. 1 or the other accused whose names do not appear on the face of these publications.

13. On this background we have to appreciate the exceptions taken to this trial on the ground of misjoinder of charges and persons and the relevant provisions would be found in Sections 233 to 239 of the Criminal Procedure Code. Out of them we are here concerned with Sections 234 and 239. Sub-section (1) of Section 234 lays down that when a person is accused of more offences than one of the same kind committed within the space of twelve months he may be charged with and tried at one trial for, any number of them not exceeding three. Sub-section (2) says that offences are of the same kind when they are punishable with the same amount of punishment under the same section. The argument of Mr. Vepari was that this section cannot be successfully invoked because here the offences are not of the same kind. The offences are said to be of the same kind when they are punishable with the same amount of punishment under the same section. The sections introduced are Sections 500 and 501 of the Indian Penal Code. The principles differ, but virtually what is made punishable is defamation, the first section contemplating verbal defamation and the other written. Even if this technical distinction sought to be drawn by Mr. Vepari were to prevail, I think Section 239 could be successfully availed of. Sub-sections (a) and (c) of Section 239, Criminal Procedure Code lay down that persons accused of the same offence committed in the course of the same transaction or persons accused of more than one offence of the same kind, within the meaning of Section 234(referred to above) committed by them jointly within the period of twelve months could be tried together. What amounts to the course of the same transaction is always a question of fact. No hard and fast rule can be laid down. It would depend upon the appreciation of evidence and the circumstances connected with the commission of the offence. So long as that is not determined, it would be premature to say that the charges imputed are not arising out of the same transaction. Similarly it is difficult to conclude whether these are offences of the same kind or otherwise within the meaning of Sub-section (c). The real and substantial test for determining whether several offences were so connected together as to form one transaction depends upon whether they are related together in point of purpose, or as cause and effect, or as principal and subsidiary acts so as to constitute one continuous action. One of the tests suggested is continuity of action and purpose. If ultimately on the evidence the complainant were to succeed in convincing the Court that continuity of purpose or design or continuity of action in these events was one and the same or, in other words, these so-called separate events or episodes were strung in the same string so as to make them inseparable from each other, then certainly the Magistrate cannot throw away the complaint on this technical ground of misjoinder of charges or persons.

14. In the result, the application is allowed. The order of discharge is set aside. The case is remanded to the lower Court for re-trial.