courtkutchehry.com

Company : CourtKutchehry
Website : www.courtkutchehry.com
Printed For :
Date : 01/09/2026

(1994) 02 GAU CK 0021

In the Gauhati High Court

Case No : Criminal Revision No. 35 of 1992

Shri P.N. Bhattacharjee APPELLANT

Vs

Shri Kamal Bhattacharjee RESPONDENT

Date of Decision : 11-02-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 146, 244, 245, 246
Income Tax Act, 1961 — Section 143(3), 271(1), 276C, 277

Citation : (1994) CriLJ 2924

Hon'ble Judges : N.G. Das, J

Bench : Single Bench

Advocate : K.N. Bhattacharjee and S. Bhattacharjee, for the Appellant; B. Das and A.C. Bhowmik, for the Respondent

Final Decision : Allowed

Judgement

N.G. Das, J.—The petitioner Shri P.N. Bhattacharjee who is Income Tax Officer of Ward No. 1, Agartala, West Tripura has approached this court u/s 482 of Cr.P.C. seeking relief for quashing the order of discharge of the accused dated 13-3-1991 passed by Judicial Magistrate, 1st Class, Agartala in Case No. C.R. 301 of 1989 and the revisional order dated 31-3-1992 passed by the learned Additional Sessions Judge, west Tripura, Agartala affirming the order of discharge.

2. The facts relevant to the determination of the points at issue are few and simple. On 25-8-1989 the present-petitioner who is the Income Tax Officer of Ward No. 1, Agartala, West Tripura filed a complaint in the Court of learned Chief Judicial Magistrate, West Tripura, Agartala against the respondent Shri Kamal Bhattacharjee alleging, inter alia, that the respondent who is an assessee of the Income Tax under P.A. No. 10-009-PV-7987 filed a false account of statement for the assessment year 1982-83 to evade Income Tax. It was alleged that the respondent as proprietor of Pioneer Trading Co. sold medicine by issuing bogus cash memoes and as a distributor of Boroline of M/s. G. D. Pharmaceuticals Limited, Calcutta he also sold Boroline at enhanced rate by issuing fictitious cash

memoes. It was also alleged that the respondent submitted the return of Income Tax for the assessment year 1982-83 on 21-10-1982 showing his total income of Rs. 38,000/-. The assessment for the year 1982-83 was completed u/s 143(3) of the Income Tax Act (here-in-after referred to as the Act) on 29-3-1985 at a total income of Rs. 75,700/-.

3. In course of assessment proceeding it was discovered by the Income Tax Officer that the respondent-assessee made extra profit by means of bogus cash memoes. The petitioner, therefore, recast the trading account which resulted in the addition of Rs. 24,315/-in the net profit for the assessment year 1982-83 which was finally reduced to Rs. 15,000/- in appeal. A penalty of Rs. 20,000/- was also passed by the Income Tax Officer u/s 271(1)(c) of the Act. The respondent, however, preferred appeal and exhausted other provisions as permissible by law. It was further alleged that the respondent deliberately concealed the particulars of his true and correct income with mala fide intention to evade tax and delivered an account or statement which was false and which he knew and believed to be false and as such the respondent committed offence punishable u/s 276C(i)(ii) and 277 of Income Tax Act, 1961. Therefore, the petitioner after obtaining necessary sanction order from the authority presented the complaint as stated above in the Court of Cheif Judicial Magistrate, West Tripura, Agartala.

4. Thereafter the case was transferred to the learned Judicial Magistrate, 1st Class, (Mr. G. C. Kar) Agartala who received the case record on 25-8-1989 and the learned Magistrate by his order dated 28-8-1989 took cognizance of the offence u/s 276(C)(i)(ii) and u/s 277 (ii) of the Income Tax Act, 1961, against the respondent Shri Kamal Bhattacharjee and issued summons to the respondent-accused. The respondent appeared before the court of Judicial Magistrate, 1st Class, Agartala and he was admitted to bail and soon thereafter the respondent challenged the maintainability of the case by tiling an application. Learned Judicial Magistrate, however, held by his order dated 27-2-1990 that the case was mainatainable and also observed that it was triable as warrant-procedure case fixing thl next date on 27-3-1990 for evidence before charge.

5. On 27-3-1990 the complainant filed petition for issuing summons to the P.Ws and accordingly learned Magistrate also passed order for issuing summons to the witnesses. On 26-4-1990 learned Magistrate examined the complainant but as service report in respect of other witnesses were not returned he fixed the next date on 3-5-1990 for PWs. But on this date also no witness turned up. So, learned Magistrate passed order for issuing fresh summons upon the PWs fixing the next d ate on 10-7-1990. At this stage the case suffered a number of adjournments for various reasons such as, absence of accused, non-attendance of witnesses, absence of Presiding Officer etc. However, on 15-1-1991 cross-examination of complainant was concluded and learned Magistrate fixed the next dated on 6-12-1991 for evidence. But as the witnesses did not turn up inspite of having received the summons the complainant filed a fresh application for issuing

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/shri-pn-bhattacharjee-appellant-has…

summons to his witnesses. Learned Magistrate rejected that prayer and fixed the case on 26-2-1991 for discussion of charges. On 13-3-1991 learned Magistrate heard learned counsel for the parties about framing of charge and on this date learned Magistrate 1st Class held that the charge brought against the accused was groundless and with this finding he discharged the accused under the provision of Section 245 subsection (2) of Cr.P.C.

6. Aggrieved by this order the present petitioner preferred a revision before the learned Sessions Judge, West Tripura, Agartala. Learned Additional Sessions Judge, West Tripura, Agartala who actually heard the revision dismissed the revision by his order dated 31-3-1992. Hence this petition u/s 482 of Cr.P.C.

7. Mr. K. N. Bhattacharje, the learned senior counsel appearing on behalf of the petitioner has contended that the learned Magistrate committed gross error of law in recording the order of discharge under the provision of Sub-section (2) of Section 245 of Cr.P.C. without examining all the witnesses who were once summoned by him. It is submitted by Mr. Bhattacharjee that in a warrant procedure case once Magistrate takes cognizance of the case, it becomes his bounden duty to compel the attendance of the witnesses to record their evidence. But in the instant case although the complainant filed necessary requisites for summoning the witnesses and the learned Magistrate issued summons, the witnesses did not turn up in spite of having received the summons. So, in the circumstances, the learned Magistrate should have issued warrants to secure the presence of the witnesses but without following that procedure learned Magistrate threw the responsibility on the complainant to bring his witnesses.

8. The procedure laid down in Sections 244-246 apply exclusively to the trial of any warrant case instituted otherwise than on a police report, e.g, on a private complaint of by the court suo motu. Sub-section (2) of Section 244 which was been substituted for old Sub-section (2) reads :-

The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing.

9. In the instant case it is clear from the order sheet of the learned Magistrate that the complainant filed necessary application for issuing summons to his witnesses and learned Magistrate also issued the summons. The summons were also served upon some of the witnesses but the witnesses did not turn up on certain grounds. Apaft from this the order dated 17-7-1990 shows that on this date the complainant was present with one witness, namely, Jaladinu Das. But on this date learned Magistrate did not examine the witness. No reason has been assigned as to why the learned Magistrate did not examine the witness. So, in view of the aforesaid provision of law it is submitted by Mr. Bhattacharjee that where the complanant submitted necessary application for issuing summons to his witnesses and this being a warrant case, the court must exhaust its power to

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/shri-pn-bhattacharjee-appellant-has…

secure attendance of the witnesses as it is also the responsibility of the court to see that justice is done by ,a fair and speedy trial. Mr. Bhattacharjee, therefore, submits that the order of discharge which was affirmed by the learned Additional Sessions Judge was, without just and sufficient ground and that it was contrary to law and against public interest.

10. But Mr. Das, the learned senior counsel appearing on behalf of the respondent has submitted that the word "may" occurring in sub-section (2) of Section 244 of Cr.P.C. indicates that it is the discretion of the court to issue summons to the witnesses. His precise submission is that Magistrate can also ignore issuing summons to witnesses. I am, however, unable to accept this contention as in the instant case the order sheets clearly show that learned Magistrate issued summons to the witnesses and summons were also served upon some of the witnesses. The procedure laid down under Sections 244-246 of Cr.P.C. does not provide on contemplate an order of discharge merely because the witnesses did not turn up pursuant to the summons.

11. In the instant case the order dated 28-8-1989 shows that learned Magistrate after perusal of the complaint took cognizance of the offence. It means that learned Magistrate was prima facie satisfied that the offence complained of was committed by the accused. I am, therefore, of opinion that where the complainant made successive prayers for issuing summons to his witnesses it is not only the bounden duty of the Magistrate to issue summons to the witnesses but it is also his bounden duty to exhaust all his powers for securing the attendance of the witnesses for disposal of the case according to law. The Magistrate has to exhaust all his powers to secure the attendance of the witnesses who were summoned before he makes his mind to dismiss the case.

12. The next contention urged by Mr. Das is that the offence complained of was committed in respect of the assessment year 1982-83 and the complaint being filed on 25-8-1989, it is barred under the provisions of Section 468 of Cr.P.C. But the learned counsel for the petitioner has submitted that Section 468 of Cr. P. C. is not applicable to the present case as the offence complained of falls under the Income Tax Act. He drew my attention to the amending Act, namely. The Economic Offences (In Applicability of Limitation), Act, 1974. It is clear from this amended Act that nothing in Chapter XXXVI of the Code of Criminal Procedure, 1973 will apply to any offence, punishable under any of the enactments specified in the Schedule: In the Schedule The Income Tax Act, 1961 comes under item No. 2. it is, therefore, clear that offence complained of is ''not covered by Section 468 of Cr.P.C.

13. The third contention of Mr. Das is that this petition being a second revision this court has no power to entertain it in exercise of its power u/s 482 of Cr.P.C. In support of this contention Mr. Das has referred to a decision of the Apex Court rendered in the case of Dharampal and others Vs. Smt. Ramshri and others, What happened in this case was that a dispute arose with regard to possession of a property between the appellants and the respondents. Respondent Smt.-

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/shri-pn-bhattacharjee-appellant-has…

Ramshri filed in application u/s 145 of Cr.P.C. before the Sub-Divisional Magistrate, Sadabad in which she claimed ownership of the suit property. On 31st May, 1976, the learned Magistrate passed a preliminary Order u/s 145 of the Code and thereafter on 22nd April, 1977 made an order of attachment u/s 146 directing that the attachment would continue till the competent Civil Court determined the rights of the parties with regard ''o the said property. Against that order a revision was filed. Sessions Judge stayed the order of Magistrate. But before the interim stay order was communicated, the attachment was already effected. The learned Sessions Judge, therefore, passed another interim order directing the police to restore the possession of the property to the appellants from whom allegedly the possession of the property was taken. The possession was restored and the said revision application was dismissed. So, the attachment order revived but the learned Magistrate passed a fresh order of attachment.

14. Against that order, once more a revision was preferred and the learned Sessions Judge stayed the fresh order of attachment passed by the Magistrate. Thereafter, the appellants filed a suit for permanent injunction against the respondent and her husband, and in that claimed an interim injunction against them. The trial court dismissed the prayer for interim injunction. Against the order of dismissal, an appeal was filed. Appellate Court allowed the appeal and issued an interim injunction. Thereafter Criminal Revision No. 19/1978 preferred by the appellant was dismissed by the Sessions Judge. Again, although the order of attachment stood revived and the order of interim injunction by the Civil Court still continued, the Magistrate on 25th July, 1978 passed another order attaching the property. Against this order of attachment passed by the Magistrate, a revision was filed by the appellants before the Sessions Judge who by his order dated 26th July, 1978 stayed the order of attachment issued on 25th July, 1978 upto 10th August, 1978.

15. On 26th July, 1978 the appellant filed an application before the Magistrate for withdrawal of attachment on the ground that there was no apprehension of a breach of the peace. On this application, on 17th October 1978, the Magistrate Ordered withdrawal of attachment. Against this order, the first respondent filed revision before the Sessions Judge who dismissed the same on 14th May, 1979. Respondent No. 1 therefore, preferred an application u/s 482 of Cr.P.C.

16. It was observed by Their Lordship that there was no doubt that the learned Magistrate had committed an error in passing the subsequent orders of attachment when the first attachment was never finally vacated and had revived, the moment the revision application filed against it was dismissed by the learned Sessions Judge. It was also observed by their Lordships that the learned Sessions Judge had also committed a patent mistake in entertaining revision application against the fresh orders of attachment and granting interim stays when he had dismissed revision application against the order of attachment earlier.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/shri-pn-bhattacharjee-appellant-has…

17. It would, therefore, be apparent from the above that the facts of that case are quite distinguishable from the present one. In the instant case learned Magistrate issued summons to the witnesses and some of the witnesses received the summons but they did not come to the court. That apart it would also appear from the order sheets dated 20-7-1990 that on that date the complainant was present with one witness, namely, Jaladin Das. The learned Magistrate did not examine the witness on that date. So, on facts the decision relied on by Mr. Das is not applicable to the present case.

18. That the order of discharge was passed without any trial is not disputed. I have already stated above that taking cognizance of a case means that the Magistrate was prima. facie satisfied that the offence complained of was committed and in such a situation the Magistrate has no alternative other than to exhaust his powers to secure the" attendance of the witnesses as they were summoned on the prayer of the complainant.

19.'' Section 482 of Cr.P.C. envisages three circumstances in which the inherent jurisdiction may be exercised, namely :-

(i) to give effect to any order under this Code;

(ii) to prevent abuse of the process of the Court &

(iii) otherwise to secure the ends of justice.

It would be manifestly clear from the order sheets of the Court of learned Magistrate that upon the prayer of the complainant he issued summons to the witnesses and that some of the witnesses also received the summons but they did not appear before the Court. Further it would appear from the order dated 10-7-1990 of the Court of learned Magistrate, 1st Class that complainant was present with one of his witnesses, namely, Jaladinu Das. But 0ri that, date learned Magistrate did not examine the witness and he also did not assign any reason why he did not examine the witness on that date, so; under the circumstances it was the bounden duty of the Magistrate to secure the attendance of the fitnesses even by coercive method for a just decision of the case.

20. In the result, this petition is allowed. the orders impugned are set aside and the case is remanded to the court of learned Chief Judicial Magistrate, West Tripura for disposal according to law. Learned Chief Judicial Magistrate is directed to dispose of the case with expedition preferably within a period of three months.

Records be sent to learned Chief Judicial Magistrate, West Tripura, Agartala immediately.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/shri-pn-bhattacharjee-appellant-has…