

(1966) 01 GUJ CK 0004
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Patel Jivraj Khimji and Others

RESPONDENT

Date of Decision : 27-01-1966

Acts Referred:

Child Marriage Restraint Act, 1929 — Section 10, 5, 5, 6, 6
Criminal Procedure Code, 1898 (CrPC) — Section 537, 537

Citation : (1966) 7 GLR 935

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

Bench : Single Bench

Judgement

N.G. Shelat, J.—The facts giving rise to this appeal broadly stated are that a complaint dated 14-4-64 was filed by the P. Section I. Lakhpat on behalf of the State against the respondents for the offences under secs. 5 and 6 of the Child Marriage Restraint Act, (XIX of 1929) in the Court of the Judicial Magistrate, First Class at Nakhatrana in the District of Kutch. That appears to have been received by the office of the learned Magistrate on 17-4-64, The complaint was registered and the learned Magistrate passed an order directing the summons to issue against the accused referred to therein on 2-5-64. The allegations in the complaint show that all the accused had brought about and solemnised a child marriage at the village Dayapur. The accused Nos. 1 and 2 are the father and mother respectively of the bridegroom who was below 18 years of age at the time of his marriage and that way a "child" as contemplated u/s 2(a) of the Act. The accused Nos. 3 and 4 are the father and mother respectively of the bride. The accused No. 6 had officiated as a priest at the time of the marriage. The accused No. 5 is said to have participated and assisted in the child marriage. It is that way that accused Nos. 1 to 5 were said to have committed an offence u/s 6 of the Act. The accused No. 6 is said to have committed an offence u/s 5 of the Act.

2.On 19-6-64 an application came to be given by the accused inter alia stating that since one year had already elapsed after the solemnising of the marriage, the complaint filed after that period was not tenable in view of Section 9 of the

Act. Instead of considering that aspect of the matter, the learned Magistrate raised a preliminary point regarding the maintainability of the complaint in view of the non-observance of the provisions contained in Section 10 of the Child Marriage Act. He found that his predecessor-in-office committed an illegality in issuing a process against the accused without holding a preliminary inquiry contemplated u/s 10 of the Act. Since in his view that provision was mandatory, the non-observance thereof vitiated all the subsequent proceedings. He also found that the provisions contained in Section 537 of the Criminal Procedure Code would not apply so as to cure the illegality committed in that respect. In those circumstances, he dismissed the complaint and the accused were acquitted u/s 245(1) of the Criminal Procedure Code. Feeling dissatisfied with that order passed on 23rd July 1964 by Mr. J. C. Desai, Judicial Magistrate, First Class, Nakhatrana, the State has come in appeal.

3. Section 10 of the Child Marriage Restraint Act provides that "any Court, on receipt of a complaint of an offence of which it is authorised to take cognizance, shall, unless it dismisses the complaint u/s 203 of the Code of Criminal Procedure, 1898 (V of 1898), either itself make an inquiry u/s 202 of that Code or direct a Magistrate subordinate to it to make such inquiry. This provision does, therefore, require the Magistrate himself to make an inquiry u/s 202 of the Criminal Procedure Code, and in absence of any such preliminary inquiry done by himself, the process issued against the accused would not be justifiable in law. The inquiry having been made by the Police Officer before he lodged his complaint on behalf of the State would not help the prosecution to say that an inquiry u/s 202 of the Criminal Procedure Code was done. That inquiry has to be subsequent to the filing of the complaint and much though Section 202 of the Criminal Procedure Code contemplates the inquiry to be done by either the Magistrate or by any other Magistrate subordinate to him or by a Police Officer or by such other person as he thinks fit, it cannot help the prosecution in saying that the compliance of Section 10 of the Child Marriage Restraint Act was made by the learned Magistrate. It provides that an inquiry is to be made by himself or by any Magistrate subordinate to him. There are no other words qualifying or helping the prosecution to say that the inquiry can as well be done by any other person or by the Police Officer as contemplated u/s 202 of the Criminal Procedure Code. The inquiry required to be made under this Act, is for the purpose of ascertaining the truth or falsehood of the complaint and the legislature has desired it to be made by the Magistrate in view of the fact that proper judicial inquiry is made in respect of such offences, before process should be issued against the accused or any of them in the case. The satisfaction of the Magistrate is considered essential u/s 10 of the Act, and that appears to be of a mandatory character. Not having held any such preliminary inquiry as required u/s 10 of the Act would amount to ignoring of the provisions contained in Section 10 of the Act. The order of issuing process against the accused was, therefore, no doubt bad inasmuch as such requirement was not complied with. Such a view has been taken in a case *In Re: Darapureddi Jaggu Naidu and Others*, , where it

was held that a preliminary inquiry is absolutely necessary before the Court can take cognizance of an Offence under the Act. Section 10 is very clear on the point and the provisions of it are mandatory. The issue of process implies that cognizance was taken without any preliminary inquiry being held as required by Section 10 and that way it was unauthorized by law and is, therefore, liable to be set aside. In that case, after setting aside the order, it was observed that it would be open to the Magistrate to hold the preliminary inquiry u/s 202 of the Criminal Procedure Code. That part of the order passed by the learned Magistrate is, therefore, proper and the effect thereof would be to set aside the order of issuing process to the accused in respect of the complaint filed in his Court.

4. It was contended by Mr. Choksi, the learned Govt. Pleader, that non compliance of such a provision by the learned Magistrate before issuing process against the accused in the case was merely an error or an omission and since there has been no failure of justice, it was curable u/s 537(a) read with the Explanation thereto. On the other hand, it was urged by Mr. Shelat that the provisions contained in Section 537 of Criminal Procedure Code would not apply inasmuch as the inquiry required to be made was under the special law such as the Child Marriage Restraint Act. According to him, even though the inquiry has to be made as contemplated in Section 202 of the Criminal Procedure Code, that inquiry is directed to be made u/s 10 of the Act and consequently Section 537 would not be of any help to the appellant. I do not think there is any force in that contention for the simple reason that the provisions contained in the Criminal Procedure Code would apply to all offences under any law in view of Section 5 of the Criminal Procedure Code. Section 5(1) says that "all offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained." Sub-section (2) of Section 5 then says that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. The offences falling under the Special Act such as the Child Marriage Restraint Act can, therefore, be investigated, inquired into, tried and otherwise dealt with, according to the provisions of the Criminal Procedure Code, though no doubt that shall be subject to the provisions of that enactment regulating the manner or place of investigating etc. The only manner in which the inquiry is required to be regulated by Section 10 of the Act is by saying that it shall be made by the Magistrate himself or by any other Magistrate subordinate to him subject to that, the inquiry has to be made u/s 202 of the Criminal Procedure Code. It is, therefore, clear that the provisions of the Criminal Procedure Code would apply and consequently there is no reason why Section 537 cannot apply to such an inquiry. In this connection, a case of AIR 1940 375 (Nagpur) was referred to by the learned Govt. Pleader for showing that the failure to hold preliminary inquiry as contemplated u/s 10 of the Child Marriage Restraint Act read with Section 202 of the Criminal Procedure Code amounted to an

irregularity which can be cured u/s 537 of the Criminal Procedure Code. In that case, it was observed that "where at the stage when the preliminary enquiry should have been made the Court had already legally taken cognizance of the offence and had already registered the case and examined the complainant as required by Section 200, Criminal P. C, it has seisin of the case and is competent to try it and the failure to hold preliminary enquiry u/s 202 although an irregularity being a non-compliance with a mandatory provision of law is one of procedure only It is one in the exercise of jurisdiction and could not destroy the competent jurisdiction which the Court already had. The irregularity can be cured by applying Section 537, Criminal P. C. In the present case, it is no doubt true that the Court was seized of the case inasmuch as it had taken cognizance of the complaint and issued summons to the accused. It is also true that the matter was adjourned for some time on one ground or the other and the only point that was raised before the learned Magistrate was that the complaint was time barred inasmuch as one year had elapsed after the solemnisation of the marriage which had taken place in contravention of the provisions of the Child Marriage Restraint Act. Instead of considering that point, the learned Magistrate found that there was some mistake committed by his predecessor-in-office and since that in his view was an important omission in complying with the provisions of Section 10 of the Act, he heard the learned pleaders of the parties and decided that preliminary point. Thus, no such point was at all raised by the accused at that stage. It is also true that the trial has not taken place so far, and there is no question of any prejudice to the accused. "With ail that it is difficult to say that it was merely a procedural irregularity curable in Section 537 of the Criminal Procedure Code. It was obviously a contravention of a mandatory provision contained in Section 10 of the Act and that way an illegality which would vitiate the order of issuing process against the accused in the case. With respect, therefore I am unable to agree with the view in that case that the defect was one of mere procedure and that way an irregularity curable u/s 537 of the Criminal Procedure Code, even though no prejudice would be caused, if the case were to proceed further.

4.1 But that does not prevent this Court from exercising its inherent power u/s 561A of the Criminal Procedure Code for securing ends of justice in a case of this kind, and set aside the order issuing process against the accused, and direct the learned Magistrate to make an inquiry himself u/s 10 of the Act read with Section 202 of the Criminal Procedure Code and then, if he is satisfied with the truth of the complaint, may issue process against them or any of them in accordance with law. That cannot prejudice the accused in any manner. Interests of justice do require that, if in fact any such offence has been committed by the accused or any of them, they should be dealt with in accordance with law.

5. The order of acquittal passed by the learned Magistrate is set "aside. The order of issuing of process passed by the learned Magistrate against the accused issue also set aside. The learned Magistrate himself shall hold a preliminary inquiry as contemplated u/s 10 of the Child Marriage Restraint Act read with

Section 202 of the Criminal Procedure Code and on his being satisfied about there being a prima facie case justifying him to issue process against the accused, he shall proceed therewith in accordance with law.