Durvasa and Others Vs. Chandrakala

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Court : Karnataka

Decided On : Aug-11-1994

Reported in : 1995(2)ALT(Cri)97; 1994CriLJ3765; ILR1994KAR2429; 1995(4)KarLJ263

Judge : S. Venkataraman, J.

Appeal No. : Criminal Rev. Petn. No. 605 of 1990

Appellant : Durvasa and Others

Respondent : Chandrakala

Advocate for Def. : Ravi B. Naik, Adv.

Advocate for Pet/Ap. : V.T. Raya Reddy, Adv.

Judgement :
ORDER

1. The petitioners who are accused in C.C. 496/90 on the file of the Munsiff and J.M.F.C., Koppal, have filed this petition under section 401, Cr.P.C. for setting aside the order dated 23-8-1990 passed by the learned J.M.F.C., issuing process against them for offence under Section 494 read with Section 109, IPC.

2. The respondent has filed the complaint before the Magistrate alleging that she is the legally wedded wife of the first petitioner, their marriage having taken place

on 2-6-1978 as per the custom of the family, that she was living with the first petitioner for 10 years and gave birth to three children, that the first petitioner was ill-treating her as he was given to some vices and ultimately he drove her out of the house in February, 1988, that she came to know in February, 1990 that the first petitioner was searching for a bride for second marriage, that she then filed a suit against him and obtained a temporary injunction restraining him from going through a second marriage, that in spite of that injunction on 8-6-1990 all the nine petitioners went to Huliyamma temple at Munirabad that there the first petitioner with the assistance of petitioners-3 and 4, who are his parents, and the assistance of the petitioners-5 and 6, who are the parents of the second petitioner, petitioner-7, who is the brother of the petitioner-2, and petitioners-8 and 9, who are relatives of petitioner-2, married the second petitioner and thus the accused have committed the offence under section 494 read with Section 109 and 34, IPC. It is further alleged in the complaint that four witnesses who had gone to the temple have witnessed the commission of the offence and that they informed the complainant about the marriage.

3. The Magistrate after taking cognizance of the offence recorded the sworn statement of the complainant and two other witnesses. After considering the allegations in the complaint and the statement of the complainant and the witnesses, the learned Magistrate passed an order holding that there was prima facie material to indicate that the first petitioner who was legally married to the complainant had during the subsistence of the marriage married the second petitioner with the assistance of the other petitioners and that they had committed the offence under section 494 read with Section 109, IPC. He has therefore ordered issue of process to the petitioners.

4. The learned Counsel for the petitioners first contended that though under section 200, Cr.P.C. the Magistrate was required to examine the complainant and the witnesses he has permitted the advocate for the complainant respondent to examine the complainant and the witnesses, that this is in violation of the provisions of Section 200, Cr.P.C. and as such the entire proceedings including the order issuing process are vitiated. He relied on the judgments of this Court in Cr.P.C. 142/90 and 697/89 as well as the decision in P. N. S. Aiyar v. K. J.

Nathan, AIR 1948 Madras 424 : (1948 (49) Cri LJ 554) in support of his contention.

5. Section 200, Cr.P.C. stipulates that the Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also the Magistrate. A plain reading of the section makes it clear that, at this stage the Magistrate is not recording evidence in the case. The section stipulates that the Magistrate should examine the complainant on oath and the other witnesses. It is only when a party examines or cross-examines a witness he is permitted to do that through his advocate. The examination that is contemplated under Section 200, Cr.P.C. is not examination by the party, but by the Magistrate. As such at this stage it is the duty of the Magistrate himself to question the complainant and the witnesses with regard to the complaint filed before him and record the substance of their statements. In P. N. S. Iyer's case the Madras High Court dealing with the scope of examination under section 200, Cr.P.C. has held as hereunder at page 424 :

'The examination of the complainant contemplated by S. 200 signifies that the Magistrate ought to interrogate him on the allegations or averments contained in the complaint to test whether they are prima facie true or not. Where the contents of the complaint are admitted to be correct on solemn affirmation by the complainant, it cannot be said that this is an examination of the complainant either on oath or otherwise. All that the complainant has done in such a case is to state before the Court that the averments mentioned in the complaint are true.'

This Court in Cr.P. 142/90 (M/s. A. K. Agencies v. N. S. Krishna Murthy, D.D. 19-4-1993) has observed that the learned Magistrate ought not to have permitted the complainant's Counsel to examine the complainant on oath, that under Section 200, Cr.P.C. a Magistrate taking cognizance of a complaint shall examine upon oath the complainant and the witnesses present, if any, and he cannot delegate that power to somebody else. Even in Cr.P. 697/89 (Andanappa v. Gurunath, D.D. 12-4-1993) a similar opinion is expressed.

6. In the present case the statements of the complainant and the two witnesses would show that they were examined by Sri RBP who is the advocate appearing for the complainant-respondent. There can be no doubt that the Magistrate has committed an error in not examining the complainant and the witness himself and allowing them to be examined by the advocate for the complainant. But the question is whether this deviation from the procedure prescribed under section 200, Cr.P.C. vitiates the entire proceedings including the order of issue of process to the accused and whether the accused can challenge the legality of the order on that ground.

7. In Cr.P. 142/90 and Cr.P. 697/89 this Court was dealing with the petitions under section 482, Cr.P.C. and the order issuing process as well as the proceedings have been quashed not entirely on the ground of the above irregularity. In those cases this Court came to the conclusion that the Magistrate had issued process without application of mind and to come to that conclusion various other factors have been taken into consideration.

8. Section 465, Cr.P.C. which corresponds to Section 537 of the Criminal Procedure Code of 1898 reads as hereunder :

'Section 465. Finding or sentence when reversible by reason or error, omission or irregularity. - (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.'

The provisions of Section 537 of the Old Code have been considered by the Supreme Court in several cases and the conclusion is that whether it be illegality or irregularity or infraction of any other provision of the Code, in order to nullify a proceeding or trial, the prejudice to the accused must be such as to cause a failure of justice. The question is whether this irregularity committed by the Magistrate in the examination of the complainant and witnesses, even if it could be said to amount illegality has caused any prejudice to the accused petitioners and whether this Court should interfere with the order issuing process to the accused.

9. In a number of cases issue of process even without examining the complainant has been held to be an irregularity which is cured by Section 537 (present Section 465) of Criminal Procedure Code. It is no doubt true that in P. N. S. Aiyar's case (1948 (49) Cri LJ 554) the Madras High Court has held that that the failure of the Magistrate to comply with the mandatory provisions of Section 200 is not a mere irregularity such as can be remedied by Section 537. It may be noted that in that case the complaint had been dismissed without the examination of the complainant. Relying on the decision of the judicial Committee in Subramanya Iyer v. King Emperor (1902) ILR 25 Mad 61 the Court held that failure to comply with the mandatory provision is an illegality and that an illegality cannot be cured under section 537, Cr.P.C. But the view of the Judicial Committee in Subramanya's case had been subsequently modified in the decisions of the Privy Council reported in V. M. Abdul Rahman v. King Emperor and Pulukuri Kottaya v. Emperor, AIR 1947 PC 67 : (1947 (48) Cri LJ 533). In Re S. Ramaswami Iyenger, AIR 1922 Mad 443 : (1922 (23) Cri LJ 691) it has held that an omission to take a sworn statement is a serious irregularity which in general prejudice the complainant and that when the case ends in conviction the complainant has no grievance and the accused cannot in general complain of the irregularity as the omission to take a sworn statement from the complainant cannot prejudice accused.

10. In Desaibhai Kushalbai Patel, AIR 1938 Bom 50 : (1938 (39) Cri LJ 214), it has been held that the omission to examine the complainant under section 200, Cr.P.C., is an irregularity which does not vitiate the proceedings. In Ramajas Marwari v. Purulia Municipality, AIR 1936 Patna 145 : (1936 (37) Cri LJ 289), while holding that the complainant ought to have been examined under Section 200,

Cr.P.C. before issuing process, the High Court has observed that it is difficult to see how the formal examination of the complainant under section 200, Cr.P.C. could have in any way been of benefit to the accused and the High Court has further held that an omission to examine the complainant must at the worst be regarded as an irregularity which is to be disregarded by virtue of provisions of Section 537(a), Cr.P.C.

11. In S. M. Jaffry v. The State : AIR1955 All318 : it has been held that an improper examination of the complainant does not amount to an illegality which will vitiate the subsequent proceedings, that it is merely an irregularity and will not affect the subsequent proceedings unless it has prejudiced the accused in any manner.

12. In API Samal v. Bisi Mali : AIR1953 Ori83 it has been held that omission to examine the complainant on oath was only an irregularity not vitiating the trial.

13. In Mahabeer Prasad v. State : AIR1958 Ori11 it has been held that the omission to examine the complainant on solemn affirmation under section 200, Cr.P.C. before sending the complainant for enquiry under section 202, Cr.P.C. is a mere irregularity which does not in any way prejudice the accused.

14. In Re. Subramanya Achari : AIR1955 Mad129 Justice Ramaswamy has considered various decisions dealing with this question and has observed as hereunder, at page 135 (of AIR) : (at pp. 519-20 of Cri LJ) :

'The net result of this analysis is that what has to be considered in each case is whether the illegality or irregularity complained of affected the competency of the court or whether it had occasioned or must be taken to have occasioned a failure of justice. To quote Dr. Nandlal (The Code of Criminal Procedure, Vol. II (Kishen Lal & Co., Lahore (1936)) the test is : Does the error go to the whole root of trial Does it in effect vitiate the proceedings Has the court assumed an authority which it did not possess Has it broken the vital rules of procedure If the error is of such a nature then the proceedings are vitiated in their very inception and the S. 537 has no application; but the mere fact that a certain provision of the Code is imperative does not itself indicate that on breach of the provision vitiates the whole

proceedings :- 'Bechu Chaube v. Emperor', AIR 1923 All 81 (2) : (1923 (24) Cri LJ 67).

That is why in AIR 1922 Madras 443 : (1922 (23) Cri LJ 691) a distinction was drawn between cases where the complainant and accused are the petitioners. The omission to examine the complainant it was held in AIR 1924 Lahore 258 : (1924 (25) Cri LJ 125) was a serious irregularity and if it caused prejudice as it generally does so far as the complainant is concerned when the complaint is thrown out, the High Court will revise. But when the case ends in conviction he has no grievance and the accused, as has been pointed out in AIR 1924 Mad 587 (1) : (1924 (25) Cri LJ 730) cannot in general complain of the irregularity, as omission to take a sworn statement from the complainant cannot prejudice the accused. This prejudice to the complainant becomes an illegality when enquiry and report under section 202, Cr.P.C., is called for because in terms of Section 202 unless the complainant is duly examined such enquiry and report under section 202 cannot be called for and are made without jurisdiction and cannot form the basis of any further action.

This unsworn complainant cannot also become the basis of further action as sanctioning proceedings under section 182, I.P.C., against a complainant without examining the complainant or witnesses named by him but only on a comparison of the complaint and the papers connected with the complaint received from the Police : In such a case the proceedings are irregular and must be quashed and the Magistrate should be directed to re-open the enquiry and examine the complainant.'

15. Thus it is seen that where the sworn statement of the complainant is not recorded by the Magistrate then it is only the complainant who will be prejudiced if his complaint is dismissed and that if however the Magistrate issues process and the trial goes on the accused cannot complain of any prejudice to him and the irregularity in the non-examination of the complaint would be an irregularity which would be cured under present Section 465 Cr.P.C. Thus a non-examination or improper examination of the complainant cannot be made a ground to set-aside the order of the Magistrate issuing process at the instance of the accused persons.

16. The learned Counsel for the petitioners next contended that there is no material to show that petitioners-3 to 9 abetted the commission of the offence and that the learned Magistrate was not justified in issuing process to them. In the complaint it is specifically alleged that accused No. 1 along with A-3 and A-4 contacted accused Nos. 5 to 7 with the help and mediation of Accused-8 and 9 to celebrate the marriage with accused No. 2 and that all the 9 accused went to the temple and the marriage was solemnised and that accused-3 to 9 celebrated the marriage. The statement of P.W. 2 shows that all the petitioners went to the temple together. Petitioners-3 and 4 are no other than the parents of the first accused and the petitioners-5 to 7 are the parents and brothers of second petitioner. The statements of the witnesses prima facie indicate that the other petitioners-3 to 9 took active part in the performance of the marriage. Though petitioners-8 and 9 are only related to second petitioner the circumstances that they have gone with the other petitioners especially in the background of the facts of this case namely that the respondent-complainant had filed a suit and obtained the injunction against the first petitioner from taking a second wife and have also actively participated in the second marriage was sufficient to persuade the Magistrate to issue process to them also. I do not think that this Court can interfere with the discretion exercised by the Magistrate after applying his mind to the material on record in issuing process to the petitioners. I do not see any good ground to interefere with the order of the learned Magistrate.

17. For the above reason this revision petition is rejected.

18. Petition dismissed.