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Court : Karnataka

Decided On : Mar-07-1962

Reported in : 1963CriLJ694

Judge : K.S. Hegde and; Mir Iqbal Husain, JJ.

Appellant : Chikmallappa

Respondent : Nagaraj and anr.

Judgement :
ORDER

1. This is a reference made by the learned sessions Judge, Shimoga Division, under Section 438 Criminal Procedure Code requesting this Court to quash the order of commitment made in C.C. No. 2212 of 1959 on the file of the Munsiff-Magistrate, Tarikere and registered as Chikmagalur Sessions case No. 5 of 1960. The learned Sessions Judge opined that the prosecution in that case is hit by Sections 132 and 197 of Criminal Procedure Code.

2. C.C. No. 2212 of 1959 referred to above was a private complaint laid by one Chikmallappa belonging to Sanchalli of Kadur Taluk. His case is that on 7-9-59 when his servant Thimiah was working in his coconut garden the accused who was then the Sub-Inspector of Police at Yagati, Kadur Taluk, came there with a Constable and asked Thimmiah about the whereabouts or one Lakshma Lambani; when Thimmiah pleaded ignorance about the same the accused grew wild and

severely assaulted Thimmiah; seeing this incident, Thimmiah's daughter went running to the complainant and informed him that her father was being beaten by somebody in the coconut garden; then, the complainant, his son Shivalingappa and one Hanumanthappa rushed to the garden and there they saw the accused forcibly taking away Thimmiah; the complainant and his companions went up to the accused and appealed to him to release Thimmiah and excuse him if he had improperly behaved; the accused who was in high spirits, without any provocation or just cause, pulled out his revolver from its socket and pointed the same at the complainant; thereafter, he shouted to the complainant and his companions that if anybody dared to go near him he would be shot; the complainant stood bewildered but his son and Hanumanthappa went a few steps forward appealing to the accused to behave better; at that stage, the accused fired at Hanumanthappa and Sivalingappa as a result of which those two persons sustained bullet injuries; on receiving those injuries those persons fell on the ground; at that stage everybody became perplexed; the accused also got nervous and entreated the complainant and others to excuse him for his hasty action and begged that arrangements might be made to remove the injured to the General Hospital, Chickmagalur for treatment promising that he would meet any expenses, even to the tune of Rs. 2000/-. Then arrange, ments were made to take the injured to the hospital. Meanwhile, the accused boarded a bus and went. It was later learnt that he had given a false message to the D.S.P. complaining that the complainant and his men tried to assault him. The learned Magistrate thought that the prosecution has made out a prima facie case; consequently he committed the accused to take his trial before the Sessions Judge of Shimoga.

3. At this stage, it may be mentioned that the Police after enquiring into the complaint laid by the complainant in this case submitted a 'B' report. The Magistrate did not accept the 'B' report and asked the complainant to prove his case. On the information given by the accused the complainant and some others were prosecuted under Sections 143, 147, 149, 224, 225 and 395 I.P.C. In C.C. No. 1857 of 1959 on the file of the Munsiff-Magistrate. Tarikere. The learned Magistrate committed the accused in both cases to take their trial before the learned Sessions Judge, Shimoga.

4. It is regrettable that in making the reference under consideration the learned Sessions Judge adopted a rather unusual course. He did not set out the prosecution case, the defence version and his own conclusions thereon. Strangely enough he straightway accepted the defence version as the true version and proceeded on that basis. It is not known how the learned Sessions Judge came to the conclusion that the defence version is the true version. The learned Magistrate who held preliminary enquiry into the matter did not accept one or the other version. He left that issue to the trial Court. The trial of the cases had not yet commenced. In those circumstances it was wholly unwise to prejudge the issues.

5. In the order of reference the learned Sessions Judge primarily proceeded on the basis that the prosecution is barred by Section 197 of the Code of criminal Procedure. The accused is only a Sub Inspector of Police. We are told that he is removable from service by the Deputy Inspector General of Police. Therefore Section 19/ Cr.P.C. is inapplicable to the facts of the case. In support of the reference the learned Government Pleader solely relied on Section 132 Cr.P.C.

6. Before proceeding to consider the scope of Section 132 Cr.P.C. we may briefly refer to the relevant provisions in Chapter IX of the Code of Criminal Procedure which deals with unlawful assemblies. That Chapter contains Sections 127 to 132-A. Section 127 authorises the Magistrates or Officers in Charge of Police Stations to direct dispersal of an unlawful assembly. Section 128 provides for the use of Civil force for. dispersing an unlawful assembly. Section 129 authorises the Magistrate to use armed forces to disperse an unlawful assembly. Section 130 authorises art Officer in command of armed forces to disperse such assemblies with the help of armed forces under his command, if so required by a Magistrate. Section 131 says that when the public security is manifestly endangered by any such assembly and when no Magistrate can be communicated with, any commissioned Officer of the Armed Forces may disperse such assembly with the help of the armed forces under his command. Section 132 which is relevant for our present purpose provides:

No prosecution against any person for any act purporting to be done under this Chapter shall be instituted in any Criminal Court, except with the sanction of the

State Government.

7. Before Section 132 can apply to the facts of a given case, it must be established that the act complained of was done or purported to have been done under Chapter IX. In other words, it must be established that there was an unlawful assembly and the person complained against purported to disperse such an unlawful assembly under any of the Sections 128 to 131. The question is as to who should establish the material facts? Is it the person who claims the benefit of that provision? Or should the prosecution prove that the accused is not entitled to the benefit of that provision?

8. Speaking generally, every one in this country - official or non-official - is equal in the eye of the law and is equally subject to the due process of law. But for obvious reasons protection have to be given and have been given to certain officials. Because of their office certain duties have to be performed by the Police Officers. Often times Police Officers have to act under very difficult and delicate situations while dealing with unlawful assemblies or assemblies which they may reasonably think to be unlawful. In such cases with best of intentions there are possibilities of transgressing the line drawn by law. There is no gain-saying of the fact that Section 132 and Section 197 Criminal Procedure Code, which are kindred provisions, are exceptions to the general rule. It is well accepted that a person who claims the benefit of a special provision has to establish that his case comes within the exception. In so proving he may rely on the prosecution evidence; he may take advantage of the probabilities of the case; he may adduce evidence alumnae to establish the same. But the fact remains that it is for him to establish that he is protected by the special provision. In other words, if any one wants to take the benefit of Section 132 then he must establish that the case against him falls within the scope of that section. It is not correct to say that the maintainability of a complaint should be decided on the basis of the facts set out in the complaint or those available from the verification statement. It is equally not correct to say that its maintainability depends on the stand taken by the accused. The question whether a given case is hit by Section 132 Cr.P.C. is not a pure question of law but a mixed question of law and fact. It has to be decided on the basis of the material available. Some times a Judge may be able to come to the conclusion

that the accused before him is protected by Section 132 on the basis of averments made in the complaint or on the basis of the materials gathered at the time of the verification. Those materials may also be gathered by means of any enquiry under Section 202 Cr.P.C. In some cases the true picture may unfold itself during the progress of the case. It is not correct to say that the question of competence of a complaint has to be considered before the case is taken on file. While it is true that the ultimate question to be decided is whether the complaint was validly instituted, the decision on that point may be reached either at the time when the complaint was taken on file or during the progress of the case or when the case is ultimately decided.

9. We have earlier mentioned that Sections 132 and 197 Cr.P.C. are kindred provisions. Therefore, the decisions under Section 197 Criminal Procedure Code are of assistance in finding out the scope of Section 132 Cr.P.C. We shall first take up the decision of the Supreme Court in Matajog Dobey v. H.C. Bhari : [1955]28ITR941(SC) . Chandrasekhara Iyer, J. delivering the judgment of the Court observed that:

It is not always necessary that the need for sanction under Section 197 is to be considered as soon as the complaint is lodged on the allegations therein contained. The question may raise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty but the facts subsequently coming to light on a police or judicial enquiry or even in the course of the prosecution evidence at the trial, may establish the necessity for sanction; whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case.

(As summarised in head note (f)) These observations are apposite in considering the applicability of Section 132.

10. Our view that it is for the accused to establish that he is entitled to the benefit of Section 132 Cr.P.C. gathers support from the decision of the Patna High Court in Huntley Hector Thomas v. Emperor AIR 1944 Pat 378. Therein it was held that when an accused person pleads Section 197 as a bar to his trial it is for him to

show the facts which bring that section into operation, Similar was the view taken by the Calcutta High Court in Abdul Rahim v. Emperor AIR 1921 Cal 697. The Nagpur High Court also took the same view in State Government, Madhya Pradesh v. Hifzul Rahman AIR 1952 Nag 12. Therein, the learned Judges observed thus:

What is enacted in Section 197 Cr.P.C. is an exception to the general rule about taking of cognizance of offences by Magistrates in Section 190. Where the accused relies on a provision in the nature of an exception as a bar to the prosecution, he has to establish all the facts which bring into play the exceptional provision. That is to say, he has not only to establish that the offence was committed while acting or purporting to act in the discharge 01 official duty but he has to go further and establish that on the date of the prosecution he was a public servant.

11. A contrary view has been taken by the Madras High Court in a number of decisions. The first decision of the Madras High Court read to us on this point is the one reported in Schamnad v. Rama Rao : AIR1933 Mad268 . That was a case where an Inspector of Police ordered the beating of certain volunteers who were picketing a shop. One Rama Rao was severely beaten and his ankle got fractured. He filed a complaint under Section 325 Cr.P.C. against the Inspector of Police and the Sub Inspector of Police, Section 132 Cr.P.C. was pleaded as a bar to the complaint. But the learned Sub Divisional Magistrate who tried the case held that no sanction was necessary. He opined that the main question for derision was whether there was an unlawful assembly when the beating was ordered. He thought that the facts before him did not establish that there was such an assembly. He observed that:

If the evidence at any stage discloses that there was an unlawful assembly at the time of the beating further proceedings will be stopped, but not till then.

The correctness of this observation was challenged before the High Court. The learned Counsel for the accused contended that the view expressed by the learned Magistrate amounted to saying that the Police officers must prove themselves to be innocent of the offences alleged against them in order to show

that the complaint was invalid for want of sanction. Burn, J. upheld the contentions advanced by Sri Ethiraj the learned Counsel for the accused. He observed that Section 132 Cr.P.C. can only operate before a trial begins and there are no provisions in the Criminal Procedure Code which authorises the Magistrates to stop a case in the middle of the trial and throw out the same as being hit by Section 132 Cr.P.C. With respect we are unable to subscribe to this view. But we are in agreement with his further observations.

The contention of the learned advocate for the complainant is that in order to decide whether a prosecution is barred under Section 132 Cr.P.C. for want of sanction of the Local Government only the complaint and the sworn statement should be referred to. This is a proposition to which I cannot assent. If it were sound it would follow that any one by appropriate assertions in his complaint and sworn statement could deprive police officers of the protection which the legislature has given them under Section 132 Cr.P.C.

Whether the bar of Section 132 Cr.P.C. applies to the facts of a given case or not is a matter for Judicial decision. That decision does not depend upon the assertions of either party. It is arrived at, as all decisions are, by sifting and' weighing the evidence before the Court. For deciding that question, the Court should take into consideration all the relevant materials placed before it. As observed by the Supreme Court in Matajog Dobey's case, : [1955]28ITR941(SC) that decision could be reached either at the time of the institution of the complaint or at any time during the progress of the case the ratio of the decision in Schamnad's case : AIR1933 Mad268 was followed by King, J. in Elaya Pillai v. Aruianandam Pillai, 1937 Mad WN 1243. On the facts established in that case there is hardly any doubt that the complaint in that case was barred by Section 132 Criminal Procedure Code. But the learned Counsel for the accused tried to take advantage of some of the observations found therein. Those observations were taken from the decision in Schamnad's case. For the reasons already mentioned, we do not think that those observations lay down the law correctly.

12. The next decision read to us bearing on the point under consideration is the one reported in Yesudasan v. Guruswamy : AIR1957 Mad555 . Here again, in our

opinion, the facts of the case clearly attracted the bar of Section 132 Cr.P.C. But the learned Judges who decided that case proceeded further and quoted with approval the ratio of the decisions in Schamnad's case : AIR1933 Mad268 and In Elaya Pillai's case, 1937 Mad WN 1243 about which we have expressed our dissent earlier.

13. The view expressed in Schamnad's case : AIR1933 Mad268 does not appear to have been consistently followed in the Madras High Court itself. In, Chinnaswami Reddiar v. Kuppuswami : AIR1955 Mad534 , Ramaswami, J. struck a different note. In paragraph 5 of his judgment he observed as follows:

Thirdly, as pointed out by me in Dowlath v. Dey 1953 Mad WN 494 whether sanction as a pre-requisite is necessary is not a pure question of law but a mixed question of fact and law; it has to be decided after information has been gathered for coming to a conclusion one way or the other. In this very case, if the Magistrate had sent for the First Information Report and the alleged report at the official enquiry and then made them part of the evidence in the manner prescribed in the Indian Evidence Act, and given an opportunity to the complainant to refute and then came to the conclusion that a prima facie case has been made out that what the Sub-Inspector did was an act purporting to be done under Chapter IX of the Criminal Procedure Code dealing with unlawful assemblies, he would have been perfectly justified in throwing out the case of the complainant and the complainant can have no grievance and this Court will not certainly interfere.

14. The view that if the accused is asked to satisfy the Court that there was an unlawful assembly and that the acts complained of were purported to have been done while dispersing that unlawful assembly, would amount to asking the accused to prove that he is not guilty of the offence with which he is charged does not appear to us to be a correct one. Section 132 Cr.P.C. has nothing to do with the ingredients of any offence. It is a protection against prosecution. In order to obtain its benefit the accused person need not prove that he committed no offence. He has only to prove that the acts complained of were done under circumstances mentioned in Section 132 Cr.P.C. In other words, he must place] before the Judge materials and circumstances justifying: an inference that there

was an unlawful assembly and the acts complained of were purported to have been done while dispersing that assembly.

15. The learned Sessions Judge has not addressed himself to the question whether the facts established in this case bring the case within the scope of Section 132 Cr.P.C. He has accepted the accused's case at its face value and made this reference. That is wholly wrong. It is for him to decide, on the basis of the proved facts, whether the plea taken by the accused is established or not. If and when he is satisfied that the proved facts bring the case within the mischief of Section 132 Cr.P.C. then he is at liberty to reject the complaint holding that it is barred by Section 132 Cr.p.C.

16. The contention that the accused is being harassed appears to be somewhat exaggerated. The case against the accused has already been committed. The case against the Complainant and his companions has also been committed. That case is numbered as Sessions Case No. 4 of 1960. Both the cases relate to the same incident. In other words, they are two versions of one incident. If after trying Sessions Case No. 4 of 1960 the learned Sessions Judge is satisfied that the complaint against the accused is barred under Section 132 Cr.P.C. then it would be appropriate for him to reject that complaint on that ground only.

17. For the reasons mentioned above, the reference is rejected.

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