

Keshava Murthy Vs. Veeraiah

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Court : Karnataka

Decided On : May-27-1987

Reported in : ILR1987KAR2285

Judge : Navadgi, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 203, 204 and 204(2)

Appeal No. : Crl. Petn. No. 588 of 1985

Appellant : Keshava Murthy

Respondent : Veeraiah

Advocate for Def. : R.S. Chakrabhavi, Adv.

Advocate for Pet/Ap. : S.S. Koti, High Court Govt. Pleader;P. Shivanna, Adv.

Judgement :

ORDER

Navadgi, J.

1. This is a petition under Section 482 of the Code of Criminal Procedure ('the Code' for short). H. L. Keshava Murthy, petitioner No. 1 and P. Lankesh, petitioner No. 2 have prayed in this petition to quash the proceedings initiated against them by the Metropolitan Magistrate, IV Court' Bangalore in C.C. No. 758 of 1985 on his

file on the grounds stated in the petition.

2. I have heard the learned Counsel for both the parties and learned High Court Government Pleader for the State. I have perused the record of the proceedings.

3. The facts material and relevant for the present purpose are these :

H. Veeraiah, the respondent lodged a written complaint against the petitioners before the Magistrate on 21-2-1985 alleging that each of the petitioners had committed an offence punishable under Section 500 of the Indian Penal Code.

4. It appears from the record that on the same day, that is, on 21-2-1985 the sworn statement of the respondent was recorded by the Magistrate and the two documents viz., (i) copy of the issue of 'Lankesh Pathrike' dated 10-6-1984 and (ii) copy of the notice sent by the respondent to the petitioners through his Advocate on 2-7-1984, were received in evidence. The Magistrate presumably after hearing the complainant or his advocate, adjourned the matter for orders to 22-2-1985 and thereafter to 1-3-1985. On 1-3-1985 the Magistrate proceeded to pass the following order:

'Perused sworn statement of the complainant and Ex. P. 1 and Ex. P. 2 which prima facie reveal that the complainant is described as criminal presumably with intent to lower his reputation. Hence, I hold that the sufficient grounds are made out to proceed against Accused-1 & 2 for offence under Section 500 IPC. Hence, register a case Under Section 500 IPC against Accused-1 & 2 and issue S/S to accused to appear before this Court to answer the charge levelled against them.....'

5. It appears, pursuant to this order summonses were directed to the petitioners and that they, in response to the summonses entered appearance before the Court.

6. Sri P. Shivanaa, Learned Counsel for the petitioners, reading the provisions contained in Section 204(2) of the Code, inviting my attention to several decisions to which I would advert a little later, urged that the provisions under Section 204(2) of the Code are mandatory and the Magistrate having issued summonses to the

petitioners in contravention of the said provisions, the proceedings initiated against the petitioners are liable to be quashed.

7. Sri R. S. Chakrabavi, Learned Counsel for the respondent Submitted that the respondent had no other witnesses except himself to substantiate and prove the allegations levelled against the petitioners that therefore, he had neither mentioned the names of the witnesses in the complaint nor enclosed a list of witnesses with the complaint and that therefore, there was no occasion for the Magistrate to comply with the mandate of law stated in Section 204(2) of the Code. Elaborating further, he contended that even if it is assumed for the sake of arguments that there has been non-compliance with the mandatory provisions of law, in view of the fact that the 'respondent has no witness to examine in support of his allegations, the case does not call for exercise of inherent jurisdiction of this Court under Section 482 of the Code.

8. Sri S. S. Koti, Learned High Court Government Pleader supporting the submission of Sri Shivanna, stated that in view of the clear illegality attached to the order of the Learned Magistrate directing the summonses to the petitioners, that part of the order may be set aside and the matter may be sent back to the Magistrate to proceed further in accordance with law.

9. Section 200 of the Code, under the Heading 'Complaints to Magistrates' provides :

'A 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 by the Magistrate :

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses.

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint ; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192 ;

Provided further that if the Magistrate makes over the case to another Magistrate under Section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.'

The object of this Section, as is clear from its reading, is to ascertain whether there is a prima facie case against the accused and to prevent the issue of a process on a complaint which is either frivolous or false or intended to cause hardship or harassment to a person shown as an accused. The examination of the complainant and his witnesses present, if any upon oath is provided, to find out whether or not there is sufficient ground for proceeding. Section 200 aims to achieve the purpose namely, to ascertain the facts of the alleged offence not specifically or elaborately stated in the written complaint ; to see whether there is a ground for proceeding against the accused and to prevent the issue of the process of the Court where the complaint is false, frivolous and vexatious and intended to merely harass the accused and to find out whether there is any matter that calls for investigation by a criminal Court.

10. We are not concerned in this case with the provisions contained in Sections 201, 202 and 203 of the Code.

11. It is clear, and there is no dispute about it that the Magistrate on 21-2-1985 took cognizance of the offence alleged against the petitioners when he proceeded to examine the respondent upon oath.

12. A reading of the order dated 1-3-1985 excerpted in extenso in the earlier paragraph would show that after going through the sworn statement of the respondent and on perusal of Ex. P.1 and P.2 produced by the respondent, the Magistrate reached the conclusion that there was sufficient ground to proceed against the petitioners. It was after reaching such conclusion that the Magistrate directed the summonses to the petitioners for their attendance to answer the charge.

13. Section 204 of the Code around which the arguments at the Bar centred and revolved, reads :

'(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be -

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under Sub section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under Sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of Section 87.

Section 204 of the Code as the sequence of Sections arranged in Chapter XV, would come into operation where the Magistrate does not dismiss the complaint under Section 203, but forms an opinion that there is sufficient ground for proceeding and commences the proceedings against the person arraigned as accused by compelling his attendance before him (the Magistrate). In sum and substance, Section 204 relates to the procedure for effecting such attendance.

14. The said Section refers to the issue of process. We are concerned in this case mainly with Section 204(2). Having regard to the language employed in Sub-section(2), it appears, the filing of list of witnesses is essential unless the

complainant is the only witness in the case. It also appears from the reading of Sub-section (3) that along with the summons or warrant issued under Sub-section (1), a copy of the complaint ought to be sent to the accused.

15. In this case, there is no express statement made by the respondent in his written complaint that he is the only witness in the cases. He has also not referred to this aspect in his sworn statement recorded by the Magistrate. In the absence of such material, though it was stated at the Bar that the respondent is the only witness in the case, the question needs to be considered as the facts stood on 1-3-1985.

16. Sri Shivanna, Learned Counsel placing reliance on the decision in *Earn Narain v. Bishamber Nath and anr.*, AIR 1961 Punjab 151 emphatically submitted that Section 204(2) of the Code is a mandatory provision and that an act done in disobedience of the said provision would be an illegal act rendering it a nullity and of no consequences.

17. The question, whether a particular provision of a statute which on the face of it appears mandatory inasmuch as it used the word 'shall' is merely directory cannot be resolved by applying any general rule. The question essentially depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor.

18. If the Legislative intent is expressed clearly and unambiguously in imperative words, such as the use of 'must' instead of 'shall' that itself is sufficient to hold the provision to be mandatory and it would be unnecessary to pursue the enquiry further. If the provision is couched in prohibitive or negative language, it can rarely be directory, because the use of peremptory language in a negative form is per se indicative of the intent that the provision is to be mandatory.

'Lord Campbell in *Liverpool Borough Bank v. Turner*, (1860) 30 LJ Ch 379 observed :

No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for

disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.

Where a statute requires that a thing shall be done in the prescribed manner or form but does not set out the consequences of non-compliance, the question whether the provision was mandatory or directory has to be adjudged in the light of the intention of the legislature as disclosed by the object, purpose and scope of the statute. If the statute is mandatory, the thing done not in the manner or form prescribed can have no effect or validity; if it is directory, penalty may be incurred for non-compliance, but the act or thing done is regarded as good.'

19. It is observed in Maxwell's Interpretation of Statutes, 10th Edition, Page 376 :

'It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may perhaps be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by consideration of convenience and justice, and when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded.'

20. Section 204(2) has been enacted in the interest and for the protection of the accused. Its disregard is likely to injuriously affect the accused in the conduct of his defence on merits. Having regard to the peremptory negative language employed in Section 204(2) of the Code, the policy apparently underlying it, the object, the provision intends to achieve and the mischief it intends to avoid, it cannot but be held that Section 204(2) of the Code is mandatory in nature.

21. The High Court of Punjab in Ram Narain's case, AIR 1961 Punjab 151 examining the provisions contained in Clauses (1A) and (1B) of Section 204 of the Code of Criminal Procedure 1898 ('Repealed Act' for short) has held that these clauses were enacted in the interest and for the protection of the accused and that their disregard is likely to injuriously affect the accused. It has been further held in the said decision that the provisions of Clause (1A) are mandatory in the sense that a process issued before the filing of the list of witnesses would be invalid, that this clause is touched in a negative language and that it goes to the power of the Magistrate to issue summons or warrant as the case may be. The decision lays down that the provision, which enjoins the Courts to satisfy themselves about the prima facie nature of a criminal nature before issuing the process, must be intended, in the absence of a clear suggestion to the contrary, to be mandatory.

22. It is well settled that contravention of mandatory provision will carry invalidating consequences. The distinction between a directory and an imperative provision of law represents the difference of the intention of the Legislature or the intendment of the enactment. Section 204(1 A) of the Repealed Code corresponds with Section 204(2) of the Code. I am in complete agreement with the view of the High Court of Punjab in Ram Narain's case, AIR 1961 Punjab 151.

23. I hold that Section 204(2) of the Code is mandatory in nature, commanding absolute compliance. In view of this conclusion of mine, I feel it unnecessary to refer to the decisions in Madhukar Daso Deshpande, v. Anant Nilkandha Deshpande, 1983 (2) KLJ 15 Nanjappa, v. State of Karnataka, : ILR 1986 KAR3635 and Mahadev, v. State of Karnataka, : ILR 1987 KAR139 relied upon by the Learned Counsel for the petitioners.

24. In Chaturbhuj v. Naharkhan, : AIR 1958 MP28 relied upon by the learned Counsel for the respondent, it has been held that having regard to the words in Clauses (1A) and (1B) of Section 204 of the Repealed Code it would be clear that the filing of the list of prosecution witnesses is essential unless the complainant is the only witness in the case and that along with the summons or warrant issued under Sub-section (1) copy of the complaint ought to be sent to the accused. It has also been held in the said decision that it is not competent for a Magistrate to issue

process without complying with the mandatory provision of Section 204(1A) and (1B) of the Repealed Code.

25. Since there is no averment either in the complaint or a statement in his evidence by the respondent that he is the only witness in the case, the principles enunciated in Chatur bhuj's case, : AIR 1958 MP28 would not go in aid of the submission canvassed at the Bar that non-compliance is merely a non-compliance of a technical nature hardly affecting the legality of the order of the Magistrate directing the summonses to the petitioners.

26. It is unfortunate that the Magistrate has not chosen to bestow care to ensure obedience to the statutory direction given in Section 204(2) of the Code. It was expected of him to ensure obedience in compliance with the mandatory provisions of law. He was required to see that the law is properly administered and the petitioners would not be prejudiced by issuance of summonses for appearance before him, in any manner, by non compliance of Section 204(2) of the Code.

27. The illegality in that part of the order of the Magistrate that directed the petitioners to appear before him on the admitted fact that summonses sent to the petitioners were not accompanied by the list of witnesses of the respondent has to be considered. So considered it would be clear that it is illegal.

28. Though it cannot be said that this is a case where the respondent has abused the process of the Court entitling the petitioners to call this Court to exercise its inherent jurisdiction, the fact remains that that part of the order dated 1-3-1985 made by the Magistrate in so far it relates to the issuance of summonses to the petitioners needs to be set aside for securing the ends of justice.

29. I, therefore, set aside that portion of the order of the Magistrate dated 1-3-1985 to which I have made a reference earlier.

30. The next question is what order is now called for. The breach of law can be corrected without prejudice to the case of petitioners-1 and 2 and without injury to the just disposal of the case. I feel on the facts and in the circumstances of the case, the just and proper order would be to send back the matter to the

Metropolitan Magistrate, IV Court, Bangalore for further proceedings in the case in accordance with law. He shall continue the proceedings from the stage at which he directed the summonses to the petitioners, by issuing fresh summonses to the petitioners in accordance with the provisions contained in Section 204 of the Code. The Magistrate shall ensure that the respondent furnishes the list of witnesses if he has, any witnesses to examine or makes a statement if he is the only witness in the case, to that effect.

31. The petition is disposed of in terms stated above.

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