

Mulchand Vs. Emperor

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Court : Allahabad

Decided On : Mar-09-1911

Reported in : 9Ind.Cas.991

Judge : Richards, J.

Appellant : Mulchand

Respondent : Emperor

Judgement :

ORDER

Richards, J.

1. This is an application in revision to set aside two orders of Mr. Harper, a Magistrate of 1st class, Cawnpore, and an order of the Sessions Judge of Cawnpore upholding the said two orders. The facts are shortly as follows: On the 21st of January of the present year one Nanhe Mal presented a complaint to Mr. Harper charging Mool Chand the applicant here with an offence under Section 409, Indian Penal Code, the allegation being that he as manager or the Managing Director of a certain Company in which Nanhe Mal was a share-holder had misapplied funds belonging to the Company. At the same time, an application was made to the Magistrate to issue a search-warrant. In the order of the 26th of January of the present year, the learned Magistrate sets forth what he says, were the circumstances. He says: 'On the 21st instant one Nanhe Mal came to Court

and presented petition to the effect that his fellow Company Director Mool Chand committed criminal breach of trust as regards the sum of Rs. 9,000 and he prayed that criminal proceedings under Section 409, Indian Penal Code, might be instituted. He also presented an application stating that he would be able to prove his allegations if certain papers and books were procured, and he accordingly asked for a search-warrant for the same. The applicant was presented by his Counsel Mr. Davies, Barrister-at-law. Mr. Davies addressed the Court and stated that it was necessary to issue the search-warrant with all possible speed and secrecy or there was otherwise no chance of the books being obtained. He also urged that as the complainant's statement, if recorded, would have to be made in the vernacular, the Court attendants would be able to convey to the accused Mool Chand information of what was impending. The Court, accordingly, agreed to treat for the time being the petition filed as information and not as a complaint and to issue the search-warrant on the strength of the same, a procedure provided (or by the terms of the search warrant given in the Schedule of the Code of Criminal Procedure.' The learned Magistrate concludes his order by stating: 'I considered I was entitled to treat the allegations made as reasonable information within the terms of the section.' Evidently, what the learned Magistrate means is that he considered himself entitled to treat the allegations in the complaint coupled with the allegations made by the Counsel as reasonable information. This order which I have just now quoted was an order made by the Magistrate on an application to set aside the search-warrant, which he had already granted on the 21st of January. The warrant of the 21st of January was addressed to the Superintendent of Police, Cawnpore, and was in the following terms: Whereas information has been laid before me of the suspected commission of the offence of criminal breach of trust and it has been made to appear to me that the production of the papers and books mentioned below is essential to the inquiry about to be made into the said suspected offence, this is to authorize and require you to search et cetera.' At the end of the warrant is a list of the books and documents. It appears from the petition in the present application that at the date when the search-warrant was issued, Mool Chand was away from home. The search-warrant was executed in his absence. From the report of the Police Officer it appears that the search was conducted in the presence of Mr. Lilly, Mr. Biddel and five other persons one being

the son and another the servant of Mool Chand. Some of the persons in whose presence the search was carried out were undoubtedly there in the interest of the complainant. The police report mentions that as it was impossible to break open the safes the Police Officer had to leave them with a seal placed on the lot in the charge of three constables. Mool Chand made two applications to the Magistrate to set aside the search-warrant and to get back his books. The applications were refused and Mool Chand then applied in revision to the learned Sessions Judge, who also refused to interfere with the order of Mr. Harper. Mool Chand now comes to this Court and asks to have the order of the Magistrate and the Sessions Judge set aside on the grounds, firstly, that the issue of the search-warrant was illegal because the Magistrate had not examined the complainant before he issued the search-warrant; secondly because at the time of the issue of the search-warrant there was no inquiry, trial or other proceeding pending; thirdly, because there were no materials before the Magistrate justifying the issue of search-warrant, and, lastly, because on the merits of the case no search-warrant ought to have been issued. Section 94 of the Code of Criminal Procedure provides that whenever a Court considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding, it may issue summons to the person in whose possession the document is, requiring him to attend and produce it. Section 96 Clause (1) provides that where any Court has reason to believe that a person against whom a summons under Section 94 has been or might be addressed, will not or would not produce the document or the thing required, the Court may issue a search-warrant. A similar provision is made for a case where the Court does not know in whose possession the document or thing is; and lastly there is a similar provision where the Court considers that the purposes of any inquiry, trial or other proceeding under the Code will be served by a general search or inspection. It is clear; from a consideration of Sections 94 and 96, that it is the duty of the Court in the first instance to consider if a summons to produce would not have the desired effect. The Court, in my opinion, ought always to remember that it is a grave step to issue a search-warrant directing that a man's house should be invaded and searched. It is necessary that power to issue search-warrants should be given but it should not be exercised without full appreciation of the gravity of the step and after the Court

has come to the conclusion that the step is really necessary in the ends of justice. It is hardly necessary to point out that no summons calling on Mool Chand to produce the documents was issued. Looking at the explanation given by the Magistrate in the order of the 26th January, it appears that he does not directly state that he had any reason to believe that Mool Chand would not produce the documents if a summons had been issued. Neither in the warrant itself, nor in the orders of the learned Magistrate, does he state that he considers that the purposes of any inquiry, trial or other proceeding would be served by a general search or inspection. The search which was directed, was a search for the specific documents mentioned at the foot of the search-warrant. The matter originated in the Magistrate's Court by the filing of the complaint of Nanhe Mal. This document was in truth and in fact what it appeared to be on the face of it, viz., a complaint of a criminal charge against Mool Chand. Section 200 of the Code of Criminal Procedure provides that a Magistrate taking cognizance of an offence on a complaint shall at once examine the complainant upon oath. The learned Magistrate feeling that he could not legally issue a search-warrant, if he treated the petition of Nanhe Mal as a complaint, without at once examining the complaint, agreed to treat the petition for the time being as information and not as a complaint.' It seems to me that the learned Magistrate was correct in thinking that if the petition was treated as a complaint, he was bound under Section 200 to examine the complainant before taking any other step, and I think that a search-warrant issued on a complaint without the examination of the complainant would be at least irregular. It is very hard to understand what real reason there was for not examining the complainant before issuing the search-warrant. If the necessities of the case had really required it, the matter could have been done with the utmost speed. The learned Magistrate seems to have been somewhat carried away by the remarks of the Counsel. I may mention here that, in my opinion, the Counsel ought not to have stated any facts connected with the case, which were not at least contained in the petition, and the learned Magistrate ought not to have permitted the Counsel to make any such statements, far less to have acted on them. It seems to me that where a Magistrate is about to take what I have already said I consider to be a very grave and serious step, it is highly desirable that the person against whom the search-warrant is about to issue,

should have the protection of the complainant being compelled to state on oath the grounds for such an order. I should hesitate to decide that in a proper case where the Court has proper information before it, it is illegal to grant a search-warrant without first having evidence taken on oath. I can conceive many cases where justice might be frustrated by the delay of having to take evidence on oath. I think, however, that when a Court is about to issue a search-warrant on the strength of information as distinguished from a complaint the Court should, if possible, examine the informant on oath and if evidence cannot be taken on oath the Court should act with a due appreciation of the fact that it is taking upon itself the responsibility of considering the weight of the information as information preparatory to issuing an order of a very serious nature. I do not think a Court would be at all justified in saying 'I will treat what I know to be a complaint just for the time being as information and thus evade what the law requires me to do, namely, when I am taking cognizance of an offence on a complaint, to at once examine the accused.' It is suggested that a great deal of information was given to the learned Magistrate by a Counsel for Nanhe Mal. In my opinion, it was altogether beyond the province of a Counsel to give information, I do not think that the statement of Counsel on behalf of a prosecuting complainant was information at all on which a Magistrate was entitled to act. In my opinion, without actually deciding that the order of the learned Magistrate was technically illegal, I think it was an order which violated the spirit of the provisions of the Code of Criminal procedure and ought never to have been made. I accordingly set aside the two orders of Mr. Harper and also the order of the Sessions Judge upholding the same.