

J.K. International Vs. State

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Court : Delhi

Decided On : May-25-2001

Reported in : 2002IVAD(Delhi)211; 2002CriLJ2601; 96(2002)DLT795; 2002(62)DRJ170

Judge : S.K. Agarwal, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 202, 203, 204, 204(1), 204(4), 245, 249, 256, 397, 398, 401(2) and 482; Negotiable Instruments Act, 1882 - Sections 138

Appeal No. : Crl. M(M) No. 4729 of 2000

Appellant : J.K. International

Respondent : State

Advocate for Def. : Pawan Sharma and ; O.P. Saxena, Advs.

Advocate for Pet/Ap. : Anup Bagai, Adv

Disposition : Petition allowed

Judgement :

S.K. Agarwal, J.

1. Admit. This petition under Section 482 Code of Criminal Procedure (for short, Cr.P.C.) is directed against the order dated 12th March, 1999 passed by the court of Metropolitan Magistrate, New Delhi dismissing in default the complaint of the petitioner No. 141/96 titled 'J K International v. SKG Solvex Ltd. and Ors. (hereinafter, the complainant).

2. Brief facts are: that the petitioner filed two complaints against M/s. SKG Solvex Limited and others, under Section 138 of Negotiable Instruments Act, 1882 on the same date. In the above complaint it was alleged that cheque for Rs. 4 lacs dated 30th July, 1996 drawn on State Bank of Indore, Bombay, issued in favor of the petitioner was returned unpaid for the reason 'payment stopped by the drawer'. The Magistrate started enquiry to find out whether there is sufficient ground to proceed. These complaints were listed together for hearing on 20th September, 1996, 5th December, 1996, 13th February, 1997, 3rd April, 1997, 8th May, 1997 and on 10th October, 1997. On the last date petitioner examined CW-1, S.C. Arora, General Manager (Legal) and authorised representative of the complainant company, in both the complaints separately, who proved the cheque Ex. CW-1/C1, legal notice Ex. CW-1/D and AD Card Ex. CW-1/E. On 14th October, 1997, it appears that the complaint in question was adjourned to 6th April, 1998 and other complaint was adjourned for 7th April, 1998. None appeared in the complaint listed on 6-4-1998, as well as on the next date fixed and the same was dismissed in default on 12-3-1999. However, petitioner/complainant continued to appear in the other complaint which was listed on 7th April, 1998 and on several dates fixed thereafter. Ultimately on 31.10.2000, accused persons were summoned. It was only thereafter, the petitioner/complainant came to know that one of the complaints filed by him was dismissed in default on 12.3.1999 with the following order:-

'None for complainant. Complainant is not attending the court for the last three dates. Dismissed in default for non-prosecution. File be consigned to the record room.

3. The petitioner has challenged the above order dismissing the complaint in default.

4. When the above petition came up for hearing, learned counsel for the petitioner argued that since the complaint was dismissed without summoning the accused persons therefore, notice to the accused persons was not necessary. They were not even impleaded as respondents. Reliance was placed on the decision of this court in *Glaxie Plywood Industries (P) Ltd. v. Vijay Kumar* 2000 VII AD (Delhi) 819. Petitioner was directed to file amended memo of parties impleading the accused persons mentioned in the complaint as parties and to file copy of the complaint. Initially notice was issued to the State.

5. Learned counsel for the State, at the outset raised a preliminary objection that notice to the accused persons mentioned in the complaint was essential. It was felt that the question: whether in the petition challenging the order dismissing the complaint in default, at the pre-summoning stage, notice to the accused persons is necessary or not, was likely to arise in several cases, therefore, Sh. D.C. Mathur, Sr. Advocate was appointed *amices curiae* to render necessary assistance.

6. I have heard learned counsel for the parties and have been taken through the record.

7. Sh. D.C. Mathur, learned senior counsel argued that the accused person has no right to participate in the proceedings during the enquiry under Section 202 Cr.P.C., at the pre-summoning stage; that the complaint at the pre-summoning stage could be dismissed under Section 203 Cr.P.C.; that the accused was not discharged; and that while exercising revisional jurisdiction the court on examination of the record under Section 398 Cr.P.C. or otherwise, can only direct the concerned court to make further enquiry into the complaint, therefore, notice to the accused persons is not necessary. Sh. Anoop Bagai, learned counsel for the petitioner, supported these arguments.

8. Legal position with regard to the right of an accused to participate in the enquiry before summoning is well settled. Object of an enquiry under Section 202 Cr.P.C. is to prevent harassment of innocent persons by indiscriminate issue of the process, where there is no sufficient material for proceeding against them. If the Magistrate after enquiry thinks that there is sufficient ground for proceeding he is entitled to issue the process. The accused has no right to participate in the

proceedings at the pre-summoning stage. The Supreme Court in Chandra Deo Singh v. Prakash Chandra Bose alias Chabi Bose and Anr. AIR 1963 SC 397 had held:

'Taking the first ground, it seems to us clear from the entire scheme of Ch. XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this, therefore, that it would not be open to the magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued; nor can he examine any witnesses at the instance of such a person. Of course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice.

But beyond that, he cannot g.'

(emphasis supplied)

9. The above view, was reiterated by the apex court in S.S. Khanna v. The Chief Secretary, Patna and Anr. : [1983]2SCR724 .

10. Under Section 203 Cr.PC if after considering the statements of the complainant, the witnesses and the result of the inquiry or investigation (if any), the Magistrate is of the opinion, that there is no sufficient ground for proceeding, he shall dismiss the complaint by a speaking order. There is no specific provision in the Cr.P.C., for dismissal of the complaint in default, for non-appearance of the complainant, at the pre-summoning stage. Sections 256 and 249 Cr.P.C., provided for dismissal of the complaint, during the trial, for non-appearance of the complainant, in summons trial and warrant trial cases respectively. In my view, on the same analogy, the power to dismiss the complaint at the pre-summoning stage

for non-appearance of the complainant, has to be read in Section 203 Cr.P.C. However, in this case it is not disputed that the complaint was dismissed in default, at the pre-summoning stage, under Section 203 Cr.P.C.. Further there is also no dispute that while exercising revisional powers under Section 398 Cr.P.C., against the order, dismissing the complaint under Section 203 Cr.P.C., Sessions Court or the High Court can direct the concerned court for further enquiry into the complaint.

11. Learned counsel for the State, relying upon proviso to Section 398 and Sub-section (2) of Section 401 of Cr.P.C. argued, notice to the accused persons mentioned in the complaint is necessary. Reliance was also placed on the Supreme Court in A.K. Subbaiah and Ors. v. State of Karnataka and Ors. 1987 SCC (Cri.) 768.

12. In order to appreciate this contention reference to Section 398 and Sub-section (2) of Section 401 Cr.P.C. is necessary. They read as under:-

Section 398 - Power to order inquiry - On examining any record under Section 397 or otherwise, the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrate may himself make or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under Section 203 or Sub-section (4) of Section 204, or into the case of any person accused of an offence who has been discharged:

Provided that no court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.

Section 401. High Court's power of revision.-

(1) xxxxx

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defense.

(3)

(4)'

13. Bare reading of Section 398 Cr.P.C. shows that on examining the record under Section 397 Cr.P.C. the revisional court has the power to direct the concerned subordinate court to make further inquiry into any complaint which has been dismissed either under Section 203 or Sub-section (4) of Section 204 or into the case of any person accused of an offence who has been discharged. Under the proviso only the person who has been 'discharged', would be entitled to notice. Conversely, if the accused has not been 'discharged' in the case, he would not be entitled to the notice.

14. Under Sub-section (1) of Section 204 Cr.P.C., if in the opinion of the Magistrate taking cognizance of the offence, there is sufficient ground for proceeding, the Magistrate has the power to issue summons or warrants for attendance of the accused. In warrant trial case accused can claim discharge under Section 245 Cr.P.C. This section provides that if upon taking all the evidences for the prosecution, the Magistrate considers that such evidence would not warrant conviction and no case against the accused is made out, the magistrate shall discharge him. The accused can also be discharge even at a previous stage, if the charge against him appears to be groundless. Under Section 249 Cr.P.C. the accused person gets discharged, if on the date fixed for hearing of the case, complainant is absent and the offence may be lawfully compounded or is not a cognizable. Even in summons trial cases, after the accused appears before the court in view of the observations made by the Supreme Court in *K M Mathews v. State of Kerala* : 1992 CriLJ3779 the accused is entitled to move an application for revocation of cognizance and for dropping the proceedings against him. In that situation also the accused shall be deemed to have been discharged. The persons against whom no process has been issued under Section 204 Cr.P.C. cannot be said to have been discharged. Admittedly in this case, process was not issued. The complaint was dismissed summarily at the pre-summoning stage under Section 203, thereforee, accused persons cannot be said to have been discharged, so as to attract, proviso to Section 398 Cr.P.C.

15. Now coming to Sub-section 92) of Section 401 Cr.P.C., it envisages that no order to the prejudice to the accused or other person, shall be made without giving him any opportunity of being heard in defense. In this case, while the pre-summoning enquiry was in progress, the complaint was dismissed in default. As accused persons arrayed in the complaint were not summoned, therefore, the question of hearing them in defense does not arise. So far as the expression 'other person' mentioned in this Sub-section (2) of Section 401 Cr.P.C. is concerned it does contemplate that the person should be given an opportunity of being heard if he is likely to be affected by the order in revision, but this sub-section has to be read in consonance with the proviso to Section 398 Cr.P.C. It cannot be read in isolation. Co-joint reading of proviso to Section 398 and Sub-section (2) of Section 401 makes it abundantly clear that in the case where the complainant is dismissed in default for non-appearance of the complainant during the inquiry at the pre-summoning stage, notice in revision against such order to the accused persons, is not mandatory and that notice would be required only, when the accused person has been discharged after summoning. This view also finds support from the decision of this court in Glaxie Plywood's case (Supra).

16. The facts in A.K. Subbaiah's case (supra) were entirely different. In that case accused persons were summoned, after preliminary evidence. In the revision petition against the order of summoning, additional parties were imp leaded. It was in that context the above observations were made. For the foregoing reasons, in my view, notice of the above petition, to the accused persons arrayed in the complaint, is not necessary.

17. I have also heard Sh.Anoop Bagai, on merits of the case have been taken through the record. Admittedly, the petitioner filed two complainants No. 141/96 and 140/96. These were heard together on number of dates. CW-1 was examined on 14.10.97, and number of documents in both the complaints were proved. Thereafter, several dates were given. There appears to be no reason as to why the abovenoted complaint was listed on 6.4.98 and the other complaint was listed on 7.4.98. The complaint in question listed on 6.4.1998 was dismissed on 13.4.1999. The Explanationn offered by the petitioner that he came to know about the impugned order dismissing the complaint in default, only after the order of

summoning, was passed in the other complaint, and that the petitioner was throughout labouring under the impression that both the complaints were being taken up together, appears to be bonafide and probable. No motive can be attributed against the petitioner for not perusing the complaint in question. In the facts and circumstances of this case, Explanationn offered by the petitioner is liable to be accepted.

18. In view of the above, petition is allowed. The impugned order dated 13.3.1999 dismissing the complaint in default is hereby set aside. The complaint is restored to its original number. Trial court is directed to proceed with the complaint in accordance with law.

19. Before parting with the order I would like to record appreciation for the assistance rendered by Sh.D.C. Mathur, Sr. Advocate as well as learned counsel for the parties. Petition stands disposed of.

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