

Ram Narain Vs. Loku Ram and ors.

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Court : Rajasthan

Decided On : Jan-14-1986

Reported in : 1986(1)WLN6

Judge : Mahendra Bhushan Sharma, J.

Appeal No. : S.B. Criminal Revision No. 8 of 1982

Appellant : Ram Narain

Respondent : Loku Ram and ors.

Disposition : Petition allowed

Judgement :

Mahendra Bhushan Sharma, J.

1. This revision petition involves an interesting question of law as to whether in a complaint case if the Magistrate decides to postpone the issues of process under Section 202(1) Cr.PC he can direct the investigation to be made by a police officer without first examining the complainant ?

2. The relevant facts for the disposal of the above enumerated point are these. Lokuram non-petitioner filed a complaint in the court of learned Munsif & Judicial Magistrate, Anupgarh on 14-10-1981 against Ramnarain, the petitioner herein and 8 others in all numbering nine under Sections 494 and 494/109 IPC. The learned

Magistrate did not examine the complainant under Section 200 Cr. PC and thought it proper to postpone the issue of process till the investigation was made by the police officer. He, therefore sent the case under Section 202(1) Cr. PC to the SHO police station, Anupgarh. The report of the SHO was received and on 22-10-1981 the learned Magistrate took cognizance of the offence against the accused persons and others as stated earlier.

3. The contention of the learned advocate Shri B.R. Arora for the accused petitioner is that the provisions of Proviso (b) of Sub-section (1) of, Section 202 Cr. PC are mandatory and no direction for investigation by a police officer before postponing of issue of process could have been given by the learned Magistrate without first examining the complainant. To appreciate the contention of the learned advocate it is proper to extract Sub-section (1) of Section 202 Cr. PC which reads as under:

202(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under Section 192, may, if he thinks fit postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a Police Officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made:

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

4. It will be clear from the Proviso (b) of Sub-section (1) of Section 202 Cr. PC that no direction for investigation shall be made where the complaint has not been made by a court unless the complainant and the witnesses present (if any) have been examined on oath under Section 300. It can, therefore, be said that in the

instant case without examining the complainant on oath the learned Magistrate postponed the issue of process and directed investigation by a Police Officer and it was done against the mandate of the legislature contained in Proviso (b) of Sub-section (1) of Section 202 Cr. PC. In *Deena Nath v. Daitari Charan* 1975 LJ 1931 it has been held that under Section 202(1)(b) the Magistrate has no jurisdiction to direct investigation without examining the witnesses. In *P.N.S. Aiyar v. K.J. Nathan* AIR 1948 Madras 424 it has been held that under Section 202(1) before issue of process complainant must be examined on oath and omission to examine is not an irregularity which is curable under Section 537 of the Code of Criminal Procedure, 1898. The Magistrate without examining the complainant in that case has directed the Police Officer to make an investigation and till then postponed the issue of process. After the receipt of the result of the investigation the Magistrate refused to issue process. In *Yakub Seikh v. The King* : AIR1950 Cal340 it has been held that the Magistrate has no jurisdiction to take cognizance unless he examined the complainant under Section 202 Cr.PC on oath. The failure to do so is fatal.

5. Mr. Garg learned counsel for the complainant non-petitioner has no dispute with the position of law that in case the Magistrate postpones the issue of process in a complaint case and directs the police to make an investigation, it is necessary that he must examine the complainant, unless the complainant is a public servant or the complaint has been made by a court, but his submission is that the non-examination of the complainant before directing the police officer to make an investigation under Section 202 Cr.PC is only an irregularity and is not such an illegality which vitiates the order of taking cognizance. In support of his contention Mr. Garg has referred to *Triloki Nath v. State* but that case is not an authority on the proposition canvassed by Mr. Garg. In that case the complaint has been made by a Public servant and it was held that it was not necessary to examine him. The report has been submitted by a Police Officer and it was held that the cognizance had been taken on a police report. It was not a case-where the omission to examine the complainant before issue of the process under Section 202 was under consideration. The other case relied on by Mr. Garg is *Tara Dutta v. State* : AIR1975 Cal450 . That case also has not dealt with the controversy which is being considered in the present case.

6. It may be stated here that under the Proviso (b) of Sub-section (1) of Section 202 Cr.PC no direction for investigation by a Police Officer can be given unless the complainant and the witness present (if any) have been examined on oath under Section 200 while the complaint has not been made by a court. Any direction for investigation without first examining the complainant and the witnesses (if any) who may be present will be in contravention of the provisions referred to earlier. Therefore if any investigation is made it will be not in accordance with law and it cannot be considered by the Magistrate while considering whether cognizance of the offence should be taken. The result in the absence of the statement of the complainant and the fact that the result of the investigation cannot be considered, will be that there will be no such material on which cognizance of offence can be taken. It may be that from the result of the investigation no case worth taking cognizance may be made out but if the statement of the complainant is there cognizance of the case may be taken. In such case it will deprive the complainant of an order of taking cognizance and issue of process. A look to Section 202 Cr.PC will make it abundantly clear that it is the duty of the Magistrate to examine the complainant. It provides that a Magistrate taking cognizance shall examine upon oath the complainant and the witnesses present (if any). If Section 200 and 202(1) along with proviso (b) of Cr.PC are conjointly read, to my mind there is no dispute that the Magistrate cannot direct investigation under Section 202(1) without first examining the complainant and the witnesses present (if any) in case the complaint had not been made by the court.

7. In the result 1 allow this revision petition, quash the order of the learned Magistrate dated 22-10-1981 under which he took cognizance of an offence against the applicant. I send the case back to the learned Magistrate with the direction to examine the complainant and the witnesses (if any) and thereafter pass an order in accordance with law.