

Abhijit Sen Vs. Superintendent (Administration) Regional Passport Officer and ors.

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Court : Kolkata

Decided On : Sep-18-2003

Reported in : 2004(1)CHN66,2004CriLJ1281

Judge : D.K. Seth and ;R.N. Sinha, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 2, 156(3), 190 and 190(1); ;Passport Act, 1967 - Section 10(2); ;[Constitution of India](#) - Article 19(1); ;Indian Penal Code (IPC) - Section 498A

Appeal No. : T. No. 458 of 2003 with W.P. No. 1412 of 2003

Appellant : Abhijit Sen

Respondent : Superintendent (Administration) Regional Passport Officer and ors.

Advocate for Def. : Sibdas Banerjee, Adv.

Advocate for Pet/Ap. : Saktinath Mukherjee, ;Bikash Ranjan Bhattacharya and ;Deb Ranjan Basu Mallick, Advs.

Judgement :

ORDER

D.K. Seth, J.

1. The writ petition was moved challenging the order impounding passport of the appellant/petitioner under Section 10(2)(e) of the Passport Act, 1967 on the allegation that a criminal case is pending against the appellant/ petitioner before a Criminal Court in India. The passport issued was sought to be impounded. The writ petition, however, was disposed of with certain directions by an order dated 14th August, 2003. In the said decision it was held that the criminal case seem to be pending before the Court against the appellant/ petitioner in the facts and circumstances of the case and, therefore, the appellant/ petitioner was enjoined from leaving India till the question is decided by the Regional Passport Officer. The scope of decision of the Regional Passport Officer was confined to the direction given in the said decision under appeal to the extent that the Passport Officer will give a hearing to the petitioner and arrive at a conclusion as to whether a criminal case is pending. The Passport Officer has already formed an opinion that a criminal case is pending. But at this stage, we do not propose to interfere with that part of the order. But the question remains whether the order of injunction passed in the said order would affect the right of the appellant/petitioner guaranteed under Article 19(1)(g) of the [Constitution of India](#).

2. Mr. Saktinath Mukherjee learned Senior Counsel in support of this appeal and the application for interim order had contended that in case the Court holds otherwise even then the Court is empowered to relax the rules. He had impressed upon the Court that the appellant/petitioner is scheduled to hold a meeting at Russia in connection with his business for which he is to leave tomorrow. This meeting is very important and would inflict serious adverse consequence on his business.

3. Mr. Mukherjee had contended that having regard to the facts and circumstances of the case, to which we will be referring in detail hereafter, no criminal case is pending in any Court in India within the meaning of Section 10(2)(e) empowering the Regional Passport Officer to impound the passport of the appellant/petitioner. He has referred to a decision by the Full Bench of this Court and also the decision of Supreme Court approving the decision by the High Court with regard to status of a chargesheet. Relying on this decision, he points out that a proceeding is initiated or understood to have been initiated before a Criminal Court only when

the cognizance of the police report is taken under Section 190 of the Code of Criminal Procedure (Cr.P.C.). In the present case, the cognizance of the chargesheet taken beyond the period of limitation was quashed by this Court with the direction to reconsider the case as to whether the cognizance could be taken after condoning the delay. Therefore, according to him, on these very facts, it cannot be said that a proceeding is pending before a Criminal Court in India within the meaning of Section 10(2)(e) of the Passport Act. Therefore, the appellant/petitioner could not be restrained from exercising his right guaranteed under Article 19(1)(g). It would then be affecting his such fundamental right without the sanction of law.

4. Mr. Sibdas Banerjee, learned Senior Counsel appearing on behalf of the respondents, opposes the application for interim order and contends that in the light of the decision of the learned Single Judge in the criminal proceeding quashing the cognizance of the chargesheet has not quashed the proceeding itself. On the other hand, it had remitted the matter for consideration before the learned Magistrate. The chargesheet is awaiting consideration of the learned Magistrate. According to him, it is a proceeding in which the learned Magistrate will take cognizance of the chargesheet. It is something different from the definition given in Section 2(i) of the Cr.P.C. defining 'judicial proceedings'. Section 10 of the Passport Act has not borrowed the expression 'judicial proceedings'. It had simply referred to proceeding pending before a Court. Therefore, the definition of 'judicial proceeding' given in the Cr.P.C. cannot be borrowed for the purpose of interpreting the meaning of the word 'proceeding' used in Section 10 of the Passport Act. No aid of the definition given in Section 2(i) Cr.P.C. could be taken for the purpose of deciphering the intention of the legislature in using the expression 'proceeding' in Section 10 of the Passport Act. It has to be read in the context in which it has been used. According to him, the proceeding referred to under Section 10 refers to a proceeding as soon the chargesheet or the police report is brought before the Court and it becomes pending consideration whether cognizance should be taken or not. It is a proceeding in respect of an alleged offence pending before a Criminal Court. According to him, the proceeding is initiated as soon the chargesheet is presented before the Court. It cannot start only with the taking of the cognizance. He contends that unless the proceeding is brought before the

Court, the Court cannot exercise its jurisdiction of taking cognizance or refusing cognizance. Therefore, the contention of Mr. Mukherjee seems to be fallacious and illusive and cannot be accepted. Referring to the decisions cited by Mr. Mukherjee, Mr. Banerjee contends that those are decided altogether in different context which is not germane to the issue we are now concerned.

5. After having heard the learned Counsel for the parties, we confine ourselves only to the question of granting of interim order in the present case.

Though, however, we need to refer to the arguments advanced by the learned Counsel for the parties and arrive at a conclusion as to whether we could grant interim order on the basis of a prima facie case to the extent by which the case of the appellant/petitioner could be brought out of the meaning of Section 10(2)(e) of the Passport Act, In case this provision of the Passport Act is attracted, in that event, in law the Court cannot grant any interim order except permitting relaxation. The question of relaxation would be considered only after we find that prima facie case is absent.

6. The question has been argued threadbare by the respective Counsel. In order to arrive at a prima facie case, we may quote the provisions of Section 10(2)(e) as hereafter:--

'Section 10. Variation, impounding and revocation of passports and travel documents : --

(1) *** ***(2) The passport authority may impound or cause to be impounded or revoke a passport or travel document --

*** ***(c) If proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a Criminal Court of India.'

7. From the above provisions, it appears that a passport granted can be impounded under the provisions of this section, which use the expression viz., if a proceeding in respect of an offence alleged to have been committed by the holder of the passport are pending before a Criminal Court in India. The entire question

turns on the interpretation of the word 'proceeding' in respect of an offence pending before a Criminal Court in India.

8. Admittedly, in the present case, a complaint under Section 498A of the Indian Penal Code (IPC) has since been made as against the appellant/petitioner by his wife. This complaint in respect of the offence was lodged on 20th December, 1997. After the police investigation was over, a chargesheet was submitted on 12th August, 2003. By an order dated 12th August, 2003 cognizance of this charge-sheet was taken by the learned Sub-Divisional Judicial Magistrate, Alipore in Lake Police Station Case No. 22 dated 20th January, 1998. This order dated 12th August, 2002 appears to have been quashed by this Court in C.R.R. No. 895 of 2003 by an order dated 29th April, 2003. We may beneficially quote the relevant portion of the said decision necessary for our present purpose:

'Now looking to the ratio of the aforesaid decision and applying the same to the facts and circumstances of the present case, I find much force in the contention of Shri Sekhar Basu and consequently I hold that the order dated 12.8.02 for taking cognizance by the learned Magistrate against this petitioner for an offence under Section 498A IPC without adverting to the provisions of Sections 473 and 470(4) of Cr.P.C. is unsustainable in law and, as such, the same should be set aside.

Accordingly, the impugned order is hereby set aside. As an inevitable consequence/the matter in question should now be sent back to the learned Magistrate with a direction to consider the question of limitation in dealing with the offence under Section 498A IPC, involved in this case taking into consideration the provisions of Section 473 specially the second part together with the provisions of Section 470(4) of Cr.P.C. and if upon looking into the materials before him and after hearing the parties if he is satisfied on the facts and circumstances of the case that the delay has been properly explained or it is necessary to condone the delay in the interest of justice he may then proceed against the present petitioner in accordance with law and also in the light of observations made hereinabove.'

9. It appears that in the said order, the order dated 12th August, 2002 was set aside on the ground that the chargesheet was submitted beyond the period of limitation and there was nothing to indicate that there was any explanation with

regard to the delay. The matter was, therefore, remitted for being considered by the learned Magistrate as to whether the delay could be condoned after the same is properly explained. Only if the delay is condoned, cognizance could be taken, in view of the setting in of the limitation as provided in Sections 470(4) and 473 Cr.P.C.

10. Now, it appears from the said order that the proceeding has not been quashed. It has only the taking of the cognizance by the learned Magistrate has since been quashed. In order to appreciate the situation we may refer to the provisions relating to the conduct of a criminal case and its initiation. Admittedly, Cr.P.C. has laid down two processes for initiation of a proceeding before a Criminal Court. One part is investigation by the police and the other part is the direction by the Court. The investigation part is done by the police authority without any control over them by the Courts. It starts with Section 156 entitling a police officer to investigate a cognizable case. It can do so under order of a Magistrate empowered under Section 190 Cr.P.C. to direct investigation under Section 156 Sub-section (3); but then in such a case the Court does not takes cognizance of the offence. After investigation is conducted a police officer is supposed to submit his report in terms of Section 173 Cr.P.C. Sub-section (3) thereof empowers him to submit the report on completion of his investigation or he may ask for time for further investigation. Now after this report is presented before this Court whether a proceeding within the meaning of Section 10(2)(e) of the Passport Act is initiated is a question to be looked into.

11. In order to decide the said question we may look into Section 190 Cr.P.C., which prescribes the condition required for initiation of proceedings. Thus, proceedings before a Magistrate is initiated when the cognizance is taken by the Magistrate. A cognizance by a Magistrate is taken when a complaint is received by the Magistrate or upon police report of such facts or upon information received from any person other than police officer or upon his own knowledge that such offence has been committed. But when cognizance is taken upon receiving a complaint under Clause (a) of Sub-section (1) of Section 190, the Court does not do anything except directing investigation under Section 156(3) by the police officer. Therefore, we cannot accept this direction to the police officer or

investigation to be a proceeding taken by the Court. It may be a cognizance of the complaint but not a cognizance of the offence. Inasmuch as this is a stage for investigation as to whether the complaint lodged disclose a case to be proceeded with and for report. Therefore, Clause (a) of Section 190 Cr.P.C. does not initiate the proceeding within the meaning of Section 10(2)(e) of the Passport Act. But as soon as a Police report within Section 190(1)(b) is taken cognizance of the proceeding is initiated before a Criminal Court. Since the next steps are the steps for taking evidence on oath and it makes it a judicial proceedings within the meaning of Section 2(i) Cr.P.C. The proceeding referred to in Section 10(2)(e) imposes a restriction on a person on his movement out of India. Article 19(1)(g) may not be affected if a passport is impounded, since the impounding does not prevent the citizen from moving inside India. He ceases to have any right to leave India. But this right of movement to leave India cannot be restricted except by an authority of law. A restriction on such right when the citizen wants to leave India in connection with his business definitely infringes his right to carry on business, if not wholly but partially. This fundamental right, which is being interfered with must have sanction of law. A sanction of law cannot be lightly construed. Therefore, when construing the implication of Section 10(2)(e), it has to be construed in a manner so as not to incorporate or encompass each and every case and thereby interfere with the right of person to move freely outside India in connection with his business.

12. The proceeding that has been referred to in Section 10(2)(e) is a proceeding in respect of an offence pending before a Criminal Court. A proceedings is pending before a Criminal Court as soon as the cognizance is taken. In case there is no delay in filing the chargesheet, the cognizance could have been taken as a matter of course and the question would have been different. But in a case where the cognizance is dependent on consideration of delay, until the delay is condoned the Court is not empowered to take cognizance. A criminal case is initiated only when the cognizance taken. The presentation of the charge-sheet before a Criminal Court may not entitle the Court to take the cognizance of the offence beyond time on the face of it. A distinction is to be drawn in the two kinds of cases: (i) where cognizance can be taken where there is no delay and (ii) where cognizance can be taken only after condoning the delay. In the latter case, in which the delay is

condoned and cognizance taken, it is a proceeding is pending before a Criminal Court.

13. In our above view, we are supported by the decision of the Full Bench of this Court reported in : AIR1962 Cal135 (A.K. Roy v. State of West Bengal). We may beneficially refer to the decision of the Full Bench as quoted from paragraphs 9 and 10 of the said decision :--

'Both Sections 169 and 170 refer to the satisfaction of the Officer-in-Charge of the Police Station or the police officer making the investigation, as indicated by the use of clauses like 'when it appears to the Officer-in-Charge of the Police Station that there is no sufficient evidence or reasonable ground'. It appears to follow, therefore, that it is for the Investigating Officer or the Officer-in-Charge of the Police Station to decide whether a final report or a chargesheet should be submitted. Accordingly, it would appear that when the police officer has submitted a final report, thinking that the case has not been proved, the Magistrate empowered to take cognizance has no power to direct the Investigating Officer to submit a chargesheet; and similarly, when the Investigating Officer submits a chargesheet, the Magistrate has no power to direct him to submit a final report. In this connection, I may refer to the observations of the Privy Council in the case Emperor v. Khawaja Nazir Ahmad . The question before the Privy Council was whether the High Court had power under Section 561A of the Criminal Procedure Code to quash the proceedings taken in pursuance of two First Information Reports i. e. the police investigation started'on the basis of two First Information Reports. In this connection the following observations of the Privy Council are relevant.

Just as it is essential that everyone accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it

would be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course subject to the right of the Court to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus.'

14. Before the above Full Bench decision, a Bench of the Calcutta High Court in the case of Parulbala Sen Gupta v. State, : AIR1957 Cal379 , after referring to the above cited Privy Council case of Emperor v. Khawaja Nazir Ahmad , observed as follows:

'The proceedings before the police investigation are proceedings over which the police have full control, and neither the Magistrate nor even the High Court has power to interfere with such proceedings. That investigation will come to its natural end only under Section 173 of the Criminal Procedure Code either by a final report or by a chargesheet.

Investigation by the police into an alleged crime involves several stages ending with the formation of the opinion whether on the materials collected there is a case to place the accused before a Magistrate for trial. This is clear from the provisions of Chapter XIV of the Criminal Procedure Code already referred to. These stages have been summarized by the Supreme Court in the case of H.N. Rishbud v. State of Delhi, (S) : 1955 CriLJ526 , the last stage mentioned being formation of the aforesaid opinion by the Police. It is, therefore, clear that if neither the Magistrate nor the High Court can interfere with the statutory rights of the police to investigate into an alleged offence, the Magistrate or even the High Court cannot interfere with the formation of the opinion by the Investigating Officer as to whether or not on the materials collected there is a case to place the accused before a Magistrate for trial. Accordingly, it would appear to follow that in any case where the police officer has come to the conclusion that there is no case to place before the Magistrate cannot call for a chargesheet, although he is not bound to accept the final report

and he has other courses open to him.'

15. This decision was approved in the decision *Abhinandan Jha and Ors. v. Dinesh Mishra*, : 1968 CriLJ97 . We may beneficially refer to the decision as quoted from paragraphs 6, 11 and 18 of the said decision :

'Both the learned Counsel pressed before us, for acceptance, the views, as expressed by the Gujarat High Court *v. Shah Lakhamshi*, : AIR1966 Guj283 . On the other hand, Mr. U.P. Singh, learned counsel for the respondent, in Criminal Appeal No. 218 of 1966, has pointed out that the Magistrate has jurisdiction, in proper cases when he does not agree with the final report submitted by the police to direct them to submit a charge-sheet. Otherwise, counsel points out, the position will be that the entire matter is left to the discretion of the police authorities, and the Courts will be powerless, even when they feel that the action of the police is not justified. Quite naturally, counsel prays for acceptance of the views expressed by the dissenting Judges, in *A. K. Roy v. State of W.B.*, : AIR1962 Cal135 and by the Bombay and Patna High Courts, in the decisions reported as *State v. Murlidhar Govardhan*, AIR 1960 Bom 240 and *Ram Nandan v. State*, : AIR1966 Pat438 , respectively.'

We are referring to these observations for the purpose of emphasizing that the scheme of Chapter XIV, clearly shows that the formation of an opinion as to whether or not there is case to place the accused on trial, has been left to the Officer-in-Charge of a police station. Bearing in mind these principles referred to above, we have to consider the question that arises for consideration, in his case. The High Courts, -which have held that the Magistrate has no jurisdiction to call upon the police to file a chargesheet, under such circumstances, have rested their decision on two principles viz., (a) that there is no express provision in the Code empowering a Magistrate to pass such an order; and (b) such a power, in view of the scheme of Chapter XVI, cannot be inferred vide *Venkata Subba v. Anjanayulu* : AIR1932 Mad673 ; *Abdul Rahim v. Abdul Muktadin* AIR 1953 Assam 112; *Amar Premanand v. State*, : AIR 1960 MP12 ; the majority view in : AIR1962 Cal135 and : AIR1966 Guj283 . On the other hand, the High Courts which have recognized such a power, rest their decision again on two grounds viz., (a) when a report is

submitted by the police, after investigation, the Magistrate has to deal with it judicially, which will mean that when the report is not accepted, the Magistrate can give suitable directions to the police; and (b) the Magistrate is given supervision over the conduct of investigation by the police, and therefore, such a power can be recognized in the Magistrate vide : AIR1966 Pat438 and : AIR1966 Pat438 .

We have already pointed out that the investigation, under the Code, takes in several aspects, and stages, ending ultimately with the formation of an opinion by the Police as to whether, on the material covered and collected a case is made out to place the accused before the Magistrate for trial, and the submission of either a chargesheet, or a final report is dependent on the nature of the opinion, so formed. The formation of the said opinion, by the police, as pointed out earlier, is the final step in the investigation, and that final step is to be taken only by the police and by no other authority.'

16. The above observations of the Apex Court makes it clear that submission of the chargesheet is a matter culminating after the investigation by the police is over and over which the Court has no control and therefore the presentation of a chargesheet cannot be said to initiate the criminal proceedings until cognizance is taken by the Magistrate to place the accused on trial.

17. In the circumstances, we are of the view that there are prima facie case in favour of the appellant/petitioner, though, however, our above finding is tentative and subject to result of the appeal.

18. At the same time, it is not in dispute that the Court has power to relax the rigor, in case where the Court in its judicious discretion thinks relaxation is necessary.

19. In the present case admittedly on an earlier occasion the appellant/ petitioner was asked to deposit a sum of Rs. 2,00,000/- (Rupees two lakhs) with the Registrar, Original Side of this Court which is still laying in deposit with the Registrar, Original Side as a condition for allowing him to leave India. Admittedly, the appellant/petitioner had left India on such condition and has also come back.

20. Mr. Mukherjee had pointed out that the petitioner has sufficient properties in India. His business stake is much more in India than outside. He also refers to the nature of the offence which is one under Chapter XX(A), a dispute between husband and wife. He wanted to make a distinction. But an offence alleged under Section 498A of IPC is as much an offence though arise out of family dispute. Therefore, that distinction is not permissible.

21. In the circumstances, subject to the decision of this Court we relax the order restraining the appellant/petitioner from leaving India on the basis of the passport granted to him. Till the decision of this application the petitioner shall be entitled to leave India on the basis of the passport. If already impounded, the passport be released to him on the basis of the security already deposited with the Registrar, Original Side. However, this is subject to the condition that the appellant/petitioner shall inform his itinerary before leaving India to the Regional Passport Authorities as well as the Officer-in-Charge, Lake Police Station and the expected dates when he is supposed to come back and every time he leaves India and comes back whenever to India, he will send information to the said respective officers.

All parties are to act on a xerox certified copy of this Dictated Order, if applied for, be made available to the parties forthwith on usual undertaking.

R. N. Sinha, J.

22. I agree.

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