

Mac Culloch Vs. the State and anr.

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Court : Kolkata

Decided On : Mar-19-1973

Reported in : 1974CriLJ182

Judge : N.C. Talukdar, J.

Appellant : Mac Culloch

Respondent : The State and anr.

Judgement :

ORDER

N.C. Talukdar, J.

1. This Rule is at the instance of the accused-petitioner, Mac Culloch for quashing proceedings under Sections 147, 323, 341, 448, 504, 427 and 506 of the Indian Penal Code, being case No. C/293/73, pending against the petitioner and others in the Court of the Chief Presidency Magistrate, Calcutta.

2. The facts leading on to the Rule are short and simple. A petition was filed by the complainant, Md. Shar-fuddin on the 30th January, 1973 before the learned Chief Presidency Magistrate, Calcutta under Sections 147, 323, 341, 448, 504, 427 and 506, I.P.C. The cause title mentioned that the application is under Section 156(3), Criminal Procedure Code and it contained a prayer to the effect that the police may be directed to take cognizance of the offences committed on treating the

complaint as F.I.R. or in the alternative process may be issued against the accused. A list of witnesses was given below the said application. The learned Chief Presidency Magistrate, Calcutta, examined the complainant on solemn affirmation and by his order dated the 30th January, 1973 held that a prima facie case was made out and summoned all the accused persons under Sections 147, 448, 504, 427 and 506, I.P.C. : the accused No. 1 further under Section 323, I.P.C.; and the accused Nos. 5 and 6 also under Section 341, I.P.C. The accused No. 5 Mac Culloch, who is the present petitioner appeared in the Court below on the 19th February, 1973 and was directed to be released on a bail of Rs. 500/-. He impugned the said proceedings and obtained the present Rule.

3. Three points have been raised by Mr. Dinesh Chandra Roy, Advocate (with Mr. S. P. Roy Choudhury, Advocate) in support of the Rule. The first one relates to merits and is to the effect that the materials on the record do not disclose any mens rea on the part of the accused in a dispute, between a tenant-landlord and a sub-tenant, that is essentially of a civil nature, and for a proper determination whereof the criminal court is not the proper forum. The second dimension of his arguments is that the petition filed is a hybrid one being both under Sections 156(3) and 4(1)(h), Criminal Procedure Code and the cognizance taken thereupon by the learned Chief Presidency Magistrate, Calcutta has been bad, vitiating thereby all the subsequent orders. The third and last branch of Mr. Roy's contention relates to a non-conformance to the mandatory provisions of Section 200, Criminal Procedure Code inasmuch as the learned Chief Presidency Magistrate, Calcutta, while taking cognizance of the offences, did not examine the witnesses present along with the complainant. In this context he submitted that no less than six witnesses were mentioned in the petition of the complaint. Mr. Abul Hossein, Advocate (with Mr. Bidyut Kumar Banerjee, Advocate) appearing on behalf of the complainant-opposite party No. 2 joined issue contending inter alia that it is premature at this stage to quash the criminal proceedings on merits on the ground that there is no mens rea disclosed; that the cognizance taken by the learned Chief Presidency Magistrate, Calcutta is on the alternative prayer made in the petition of complaint; and that there has been no non-conformance to Section 200, Criminal Procedure Code; inasmuch as there are no materials on the record to establish that witnesses were present on the occasion along with the

complainant. Mr. Barendra Nath Sur, Advocate, appearing on behalf of the State also opposed the Rule. He submitted in the first instance that there should be no quashing of the criminal proceedings at this stage and the points raised may be decided on proper materials adduced during the trial. Mr. Sur further contended that the complainant was examined and the relevant papers were perused before the processes were issued and as such there has been no prejudice.

4. Having heard the learned Advocates appearing on behalf of the respective parties and on going through the materials on the record I will now take up for consideration the first dimension of the arguments advanced on behalf of the accused-petitioner. Mr. Roy contended that the dispute on ultimate analysis does not disclose a criminal offence and the continuance of the present proceedings would be an abuse of the process of the Court. He further submitted in this context that there is clearly no mens rea on the part of the accused. Mr. Roy's submissions relate to the merits of the cases and it is difficult at this stage to decide either way. Whether the accused persons had mens rea or not can only be determined on proper materials adduced during the trial. It is pertinent in this context to refer to the case of *R. P. Kapur v. State of Punjab* : 1960 CriLJ1239 wherein Mr. Justice Gajendragadkar (as his Lordship then was) delivering the judgment of the Court observed that 'ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage', I respectfully agree with the same and I hold that quashing is always an extraordinary remedy and can only be allowed in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. The first ground urged by Mr. Roy is a point which is to be decided on merits and on proper materials adduced before the learned Chief Presidency Magistrate, Calcutta at the proper stage, and is therefore premature. I agree therefore with the submissions made by Mr. Hossain and Mr. Sur and I hold that on this ground alone the proceedings in the Court below cannot be quashed. I will proceed therefore to consider the other two contentions.

5. The second dimension of Mr. Ray's contentions relates to the cognizance as taken being bad and improper. The steps of Mr. Ray's reasoning in this context are

that the cause-title of the application filed is under Section 156(3) Criminal Procedure Code; that the prayer portion is however two fold, viz. that the police may be directed to take cognizance on treating the complaint as F.I.R. or in the alternative, processes may be issued against the accused; and that the petition filed is a hybrid one both under Section 156(3) and Section 4(1)(h), Criminal Procedure Code. Mr. Ray submitted that under Section 156(3) of the Code the learned Magistrate, empowered under Section 190, may order an investigation into a cognizable case. But the amalgam petition filed by the complainant led to a hybrid procedure being followed by the learned Chief Presidency Magistrate, Calcutta, The resultant cognizance is therefore bad. Mr. Hossain contended that prayers being made in the alternative, the taking of cognizance on the application is on a complaint under Section 4(1)(h), Criminal Procedure Code and is therefore not bad and improper. Mr. Sur appearing on behalf of the State also joined issue and submitted that there has been no defect and even if there was any, the same has been cured under Section 537, Criminal Procedure Code. On a consideration of the petition and prayers made therein, I agree with the submissions made on behalf of the opposite party No. 2 and the State. By and large, the application is in the alternative and ultimately the learned Chief Presidency Magistrate, Calcutta has proceeded on the second part of the prayer contained in the petition and issued the processes. The procedure followed accordingly has not been illegal or improper. The proceedings therefore pending in the Court below cannot be quashed on this around also and the second dimension of Mr, Ray's arguments accordingly fails.

6. The third and last branch of Mr. Ray's contentions is one of law and relates to procedure based on the interpretation of Section 200. Criminal Procedure Code. Mr. Ray submitted that in the present case there are no less than six witnesses mentioned in the petition of complaint and there is no reason as to why the complainant alone was examined. Mr. Hossain joined issue and submitted that the emphasis by the legislature is 'on examining the witnesses present, if any'. The learned Magistrate is not bound to examine witnesses who are not present and in any event the purported defect is curable under Section 537. Criminal Procedure Code. Mr. Sur, appearing on behalf of the State, supported the submissions of Mr. Hossain, It is pertinent therefore to refer to the provisions of Section 200 as

amended by Act 26 of 1955. It provides as follows:

A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate'. This is followed by a proviso containing four paragraphs but those will not be pertinent for consideration at this stage. Mr. Hossain submitted that the word 'shall' is not mandatory and in any event a non-examination of the witnesses along with the complainant will not vitiate the proceedings. The provisions, in my opinion, are undoubtedly mandatory. Some meaning and effect must be given to the intention of the legislature as incorporated in the words of the statute. As was observed by Lord Sumner in the case of *Quebec Railway Light, Heat and Power Co. Ltd. v. Vandry* AIR 1920 PC 181 at p. 186 that effect must be given if possible to all the words used, for the legislature is deemed not to waste its words or to say anything in vain.

I respectfully agree with the same and giving effect to all the words incorporated in Section 200, I hold that the provisions thereof are undoubtedly mandatory and not discretionary. The provisions of the Section are not a mere formality and a non-conformance thereto will be a non-conformance to the procedure established by law. It is pertinent to refer to the observations of Lord Roche in the wellknown case of *Nazir Ahmed v. King Emperor* (1936) 63 Ind App 372 at pp. 381-382 : 37 Cri LJ 897 (PC) viz. that

where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.

It is difficult therefore to agree with the submissions of Mr. Hossain that the provisions are merely directory and/or a mere formality, a non-conformance whereof will amount at best to a defect curable under Section 537, Criminal Procedure Code. The second branch of Mr. Hossain's submissions in this context is more material, as to whether any witnesses at all were present at the time when the complainant was examined, because the legislature in its wisdom has laid down that the learned Magistrate shall examine 'the witnesses present, if any'. In

the first place it does not appear from the record that such witnesses were not present and secondly no averments have been made that witnesses were not so present. After the Amending Act 26 of 1955, a cloud was raised on the point as to whether the examination of the witnesses is obligatory at the time of the examination of the complainant on solemn affirmation. In the case of *Dattatraya Dulaji Ghadigaonkar v. Wadilal Panchal* AIR 1958 Bom 335 : 1958 Cri LJ 1134 it was held that if the complainant did not ask the Magistrate to examine the witnesses, there was no obligation on his part to take such evidence suo motu. The imprimatur of judicial decisions however, took a different view. By and large the present view is that the section having cast an imperative duty to examine the witnesses as well, the more rational interpretation would perhaps, be that the magistrate ought to enquire if there are witnesses to be examined. In a recent decision of the Madras High Court in the case of *P. S. Ramaswami Nadar v. R. Viswanathan* 1957 Cri LJ 673 (Mad) Mr. Justice Somasundaram observed that

The Section is mandatory, and it is therefore obligatory on the part of the Magistrate to examine not only the complainant, but also the witnesses who are present in Court. The Magistrate in future will do well in asking the complainant as soon as he is examined on oath whether any witnesses are present in Court, and if witnesses were present, it is his duty to examine them on oath; but if no witnesses are present, he will do well to mention in the order itself that no witnesses were present according to the statement of the complainant or the advocate who appeared in Court.

I respectfully agree with the observations made above and in my view the same dovetails into the intention of the legislature as incorporated in the amended provisions of Section 200, Criminal Procedure Code. In the present case there is no such finding in the order impugned and the benefit must enure to the accused.

7. It is pertinent in this context to refer also to a recent case of the Supreme Court viz. the case of *Nirmaljit Singh Hoon v. The State of West Bengal* : [1973]2SCR66 . Mr. Justice Shelat delivering the judgment on behalf of himself, Mr. Justice Dua and Mr. Justice Khanna observed at p. 2646 that 'the object of such examination is to ascertain whether there is a prima facie case against the person accused of the

offence in the complaint, and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such a person'. The Supreme Court further proceeded to observe that 'such examination is provided therefore to find out whether there is or not sufficient ground for proceeding'. I respectfully agree with the said observations and I ultimately hold that the provisions of Section 200 are not a mere formality, but have been intended by the legislature to be given effect to for the protection of the accused persons against unwarranted complaints. It was urged by Mr. Sur on behalf of the State that the defect if any is cured under Section 537, Criminal Procedure Code and that there has been no prejudice because the learned Chief Presidency Magistrate before issuing processes not only examined the complainant on solemn affirmation but also perused the relevant papers. It is difficult to agree with this view inasmuch as the non-conformance alleged is a non-conformance to the mandatory provisions of the Statute resulting in a non-conformance to the procedure established by law. There are no materials on the record to establish that besides the complainant, other witnesses were not present in Court on the date when cognizance was taken and processes were issued. The complainant has thrown no light on the point at issue and there is also no finding thereupon. In view of the facts and circumstances and in view of the position in law, I uphold the objection raised in this behalf by Mr. Ray on behalf of the accused-petitioner, that the proceedings have been vitiated and any further continuance thereof would be an abuse of the process of the Court. Defects in procedure brought to the notice of the Court should be set right at the earliest stage as otherwise there will ultimately be prejudice to all concerned. Mr. Hossain lastly submitted that a direction may be given for a fresh prosecution in accordance with law. This will be travelling beyond the ambit of the Rule. No such directions by the Court are necessary, if such a prosecution otherwise lies and the complainant chooses to do so. The third and last dimension of Mr. Ray's contentions accordingly succeeds.

8. In the result, I make the Rule absolute; and I quash the proceedings, being case No. C/293/73, pending before Shri H. N. Sen, Chief Presidency Magistrate, Calcutta under Sections 147, 448, 504, 427, 506, 341 and 323, I. P. C. against all the accused, also under Section 323, I. P. C. against the accused No. 1, and under Section 341, I. P. C. against the accused Nos. 5 and 6.

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