

Kanhu Ram and ors. Vs. Durga Ram

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Court : Himachal Pradesh

Decided On : Nov-16-1979

Reported in : 1980CriLJ518

Judge : T.U. Mehta, C.J.

Appellant : Kanhu Ram and ors.

Respondent : Durga Ram

Judgement :

ORDER

T.U. Mehta, C.J.

1. This petition is filed by the above referred petitioners against the order passed by the Chief Judicial Magistrate, Bilaspur, overruling the petitioner's objections to the issue of process on the ground that the respondent, who is a private complainant, had no locus standi to initiate criminal proceedings for the offence contemplated by Section 7 of the Untouchability (Offences) Act, 1955 which is re-named as Protection of Civil Rights Act, 1976.

2. The facts of the case are that on 14th March, 1978, there was quarrel between one Rarnka and the present petitioner No. 14 Babu Ram. As a result of this quarrel, Ramka was sought to be prosecuted, and in those proceedings, the present respondent stood surety for Ramka. Ramka is admittedly a Harijan, a member of the scheduled caste, and hence, is considered to be an untouchable by

some high caste persons.

3. The allegation of the respondent-complainant, who is himself a Rajput by caste, says that on 26-3-1978 the present petitioners who are also Rajputs assembled in the house of petitioner No. 3 Vijay ram and resolved to ex-communicate him as he became the surety of an untouchable person. They are also said to have resolved to call the respondent-complainant a Harijan.

4. On these allegations the respondent filed a private complaint in the Court of the Chief Judicial Magistrate, Bilaspur on 24-4-1978, Proceedings of the court of the learned Magistrate show that on 27-4-1978 the learned Magistrate postponed the issue of process and directed an investigation to be made by the concerned Station House Officer. The S. H. O. reported on 11-5-1978 that a police challan was already produced before the court with regard to the same incident against six accused persons, and therefore, no further enquiry was required to be made in this case. After the receipt of such a report of S. H. O., the court took up the matter on 31-5-1978 and ordered that the file of the present case along with the challan produced by the police in the other case should be put before the court on 8-6-1978. On 8-6-1978, the matter again came up before the court but no progress was made and the case was adjourned to 14-6-1978, on which date the court issued process in this case.

5. It is found that thereafter on 6-12-1978 the present petitioners moved an application before the learned Magistrate that the respondent-complainant being a Rajput had no locus standi to file this complaint. The contention appears to be that it is only a scheduled caste person who can file such a complaint. The learned Magistrate rejected this application on 11-1-1979 holding that the offence in question was cognizable and since there was no provision that only a scheduled caste person could file a complaint of this type the objection had no substance.

6. Being aggrieved by the above referred decision of the learned Magistrate, the petitioners have preferred this application. In this application, apart from the original contention that the respondent-complainant had no locus standi to file this complaint, one more contention is raised to show that the process issued by the learned Magistrate is illegal inasmuch as provisions of Section 204 (2) which

require that a list of prosecution witnesses should be filed before the process is issued, have not been complied with.

7. So far as the first contention is concerned, it is evident by reference to Section 15 of the Untouchability (Offences) Act, 1955 that the offences under the Act are cognizable and there is nothing in the Act to show that only a particular person can file a complaint for the offences committed under the Act. Under the circumstances, there is no substance in the contention that the respondent-complainant has no locus standi to file this complaint.

8. So far as the next contention is concerned, it is apparent from the provisions of Section 204 of the Criminal Procedure Code, 1973 that it provides that no summons for warrant shall be issued against the accused under Sub-section (1) until a list of the prosecution witnesses has been filed. The argument was that since it is apparent from the complaint as well as the statement of the complainant which was subsequently recorded that neither of them disclose any list of witnesses, the order issuing the process is vitiated. My attention was drawn to the decision given by the Punjab High Court on this point in *Ram Narain v. Bishamber Nath* reported in wherein it is held that the provisions of clause (1-A) which was equivalent to clause (2) of Section 204 of the Cr. P. C. 1973) are mandatory in the sense that a process issued before the filing of the list of witnesses would be invalid. It is further observed in that decision by Dua, J. that provisions which enjoin the courts to satisfy themselves about the prime facie nature of a criminal charge, before issuing a process, must be intended, in the absence of a clear suggestion to the contrary, to be mandatory.

9. I find that before the Punjab High Court pronounced the above referred decision, a single Judge of Madhya Pradesh High Court also took a similar view with regard to clause (1-A) of Section 204 of the old Code as reported in *Chaturbhuj v. Naharkhan* : AIR 1958 MP28 , In another decision of Gujarat High Court, a learned single Judge of that Court held in *Patel Dhanji Mavji v. Gadhvi Govind Jiva* 1974 Cri LJ 241 that provisions of Section 204 (1-A) are mandatory, and that they were enacted for protecting the interest of the accused. It is further observed in that case that where nothing was brought on record by the complaint

to indicate that he does not want to examine any other witness and that he was the solitary witness, and if the 'court has not made any enquiry from the complaint on this point, the order passed regarding the issuing of process without filing any such list as required by the section could not be sustained in law.

10. As against this, a Full Bench of Jammu and Kashmir High Court has held in *Abdullah Bhat v. Ghulam Mohd. Wani* reported in 1972 Cri LJ 277 that non-compliance of Section 204 (1-A) is not an illegality which renders subsequent proceedings null and void but a curable irregularity. It is further observed in that decision that Section 204 (1-A) which is a salutary provision is made not in public interest but only for the protection and benefit of the accused and has to be complied with normally; however It is not mandatory in the sense that even if no prejudice is caused to the accused it will vitiate the trial.

11. In *Banarsi Das v. Berar Oil Industries* reported in (1966) 2 Delhi LT 357 the Punjab High Court held that unless the failure to comply with mandatory provisions of Section 204 (1-A) of the Cr. P. C. have caused some prejudice, the proceedings are not vitiated.

12. In *Sunilakhya Chowdhury v. H.M. Jadwet* reported in : AIR1968 Cal266 ., a single Judge of the Calcutta High Court has observed that the intention 'of the Legislature in enacting Section 204 (1-A) is quite clear, and it is, that before issuing of the summons or warrant against the accused persons, the list of witnesses should be filed because the point of time need not be when the petition or complaint is filed.

13. The Supreme Court has casually touched this point in *Mowu v. The Supdt. Special Jail, Nowgong* in paragraph 16 of the reported judgment : (1971)3SCC936 , but did not decide the point in view of the fact that the procedure prevailing in Nagaland was different.

14. It should be noted before proceeding further that Miss Kamlesh Sharma, the learned Advocate of the respondent contended that she was instructed to say that along with the complaint her client had filed a list of witnesses and had also supplied a further list of witnesses sub-sequently. However, no such list is found in

the record of the case and, therefore, no notice of any such filing can be taken.

15. I am of the opinion that even if filing of a list contemplated by Sub-section (2) of Section 204 is considered to be mandatory, the provisions contained in Section 465 of the Code have to be taken into consideration before declaring the issue of process as illegal. This Section 465 of the new Code is equivalent to Sec. 537 of the old Code and it provides that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal, or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during the trial unless in the opinion of the appellate or the revisional court a failure of justice has, in fact, been occasioned thereby. The difficulty which is relied upon by the learned Advocate of the petitioners is the difficulty amounting to an error in issuing the process. Therefore, the impugned order issuing the process cannot be set aside unless this Court finds that it has resulted in failure of justice.

16. The crucial question, therefore, is whether, even if it is believed that the order issuing process was illegal, that order has resulted in failure of justice. I find that the obvious answer to this question is in the negative, because the matter has not yet proceeded further and the complainant can be asked to furnish a list of witnesses before evidence is recorded in the case, so that the accused, for whose protection Sub-section (2) of Section 204 is enacted, can know the nature of the evidence which the complainant is likely to produce. Moreover, the above referred proceedings which were undertaken in the case before the process was actually issued show that as regards the same incident the police has instituted a case and has filed a challan. That challan was perused by the court and it would be also open to the accused to have a reference to that challan. Under these circumstances, I find that even believing that the provisions contained in Sub-section (2) of Section 204 Cr. P. C. are mandatory, since the matter has not proceeded further and since it is yet open to supply the necessary information to the accused as regards the names of the witnesses against him, this is not a case in which it can be said that there has been any failure of justice within the meaning of Section 465 of the Code of Criminal Procedure. In this connection I very respectfully endorse the view taken by the Full Bench of the High Court of Jammu

and Kashmir in the above referred case of Abdullah Bhat v. Ghulam Mohd.

17. In the result this application fails and the same is dismissed. I, however, order that before recording evidence, the learned Magistrate shall compel the complainant to file a list of witnesses whom he proposes to examine and shall thereafter proceed to record evidence in the case. Orders accordingly.

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