

Prithvi Nath Vs. R.C. Kaul

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Court : Jammu and Kashmir

Decided On : Aug-14-1974

Reported in : 1975CriLJ216

Judge : S. Murtaza Fazal Ali, C.J.,;Jaswant Singh; and; M. Jalalud-Din, JJ.

Appellant : Prithvi Nath

Respondent : R.C. Kaul

Advocate for Def. : Mr. T. Hussein, Mr. Hussain

Judgement :

ORDER

S. Murtaza Fazal Ali, C.J.

1. This is a revision application against an order passed by the First Addl. Munsiff J. M. Srinagar dated 28-1J72 ,by which he accepted the prayer of the accused-respondent for directing the complainant to be examined as a witness before production of the evidence in the case. This order was upheld in revision by the Section 4 M. Srinagar who refused to make a reference to this Court . The petition arises in the following circumstances.

2. The petitioner-complainant instituted a complaint under Section 500, Ranbir P. C. against the accused before the First Addl. Munsiff J. M. Srinagar, on 17-1-72. The Magistrate took cognizance of the case and summoned the accused. On 28-

1-72 the complainant produced one witness, namely All Mohd. in support of his case but the accused took the objection that before taking any further evidence, the court must record the statement of the complainant himself. This objection seems to have found favour with the Magistrate who directed the complainant to be produced in court by his order dated 28-1-72 for recording his statement. The learned Magistrate was of the view that under the provisions of Section 252(1) of the Criminal P. C. it was incumbent on the court to hear the complainant, which obviously meant that the statement of the complainant had to be recorded, and it was ordered that the complainant should be produced before the court on the next date of hearing. Against this order the petitioner went up in revision before the C. J, M. who agreeing with the learned Magistrate, refused to make a reference to this Court for quashing the order of the Magistrate. Hence this revision petition.

3. The revision petition was heard in the first instance by a single Judge of this Court , D. D. Thakur, J. who found that the point involved was not free from difficulty and he also doubted the decision of this Court in Afzal Beg v. State. AIR 1959 J & K 77 - 1956 Cri LJ 978 and accordingly made a reference to a larger Bench. That is how the matter has come up before the Full Bench.

4. Two points have been argued before us. In the first place it was argued by the petitioner that the word 'hear' appearing in Section 252(1) does not necessarily mean the recording of the statement of the complainant but merely means the summary examination of the complainant or granting an audience to him. Mr. T. Hussein appearing for the respondent first submitted that the word 'hear' included the examination of the complainant also. Secondly it was contended by Mr. Hussain that the court had the undoubted power to regulate the order in which witnesses were to be examined and this power was saved by Section 252 and if the court exercised its discretion in compelling the complainant to be examined, there was no error of discretion. We shall take up the first contention now.

5. Learned counsel for the petitioner has cited some authorities to show how the word 'hear' has been interpreted by various courts in India. A perusal of the scheme of the Criminal P. C would show that the word 'hear' has been used on various occasions in different contexts. It is therefore impossible for us to lay down

a rule of universal application as to what is the meaning of the word 'hear' but it may be possible to deduce a fairly clear concept of the connotation of the word 'hear' as appearing in Section 252 of the Criminal P. C with which we are concerned here. Section 252(1) of the Criminal P. C. runs thus:

In any case instituted otherwise than Con) a police report, when the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution.

It will be seen that in Section 200 of the Criminal P. C. which precedes this section and which relates to taking cognizance of a case by a Magistrate the clear words used are:

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.

A comparison of the language used by the legislature in these two important provisions leads to the irresistible inference that the legislature was fully aware of the distinction between hearing the complainant and examination of the complainant. Whereas in Section 200 the legislature has deliberately used the words 'examine the complainant meaning thereby that the statement of the complainant shall be recorded, in Section 252 the word used is 'hear' and not 'Examine'. Indeed If the intention of the legislature was that the complainant should be examined under Section 252. then there was no reason why the word examine should not have been used by the legislature. It would thus appear that a clear distinction is sought to be made between the connotation of the words 'examine' and 'hear'. Furthermore In Section 252 when the legislature refers to production of evidence, it says so specifically by using the words 'take all such evidence as may be produced'. Thus Section 252 itself makes a distinction between taking of evidence produced and hearing the complainant. In these circumstances our view is that the word 'hear' has been used in Section 252 not in the wider sense of the examination of the complainant on oath, but only in a

limited sense that the court shall have to give a right of audience to the complainant regarding the nature and character of the evidence that he wants to produce. We decided this question specifically in AIR 1959 J & K 77 - (1969 Cri LJ 978) where a Division Bench of this Court to which I was a party observed as follows:

The expression 'hear the complainant' does not only occur in Section 208(1) but these words are used in Sections 244(1) and 252(1) relating to trial of summons cases and warrant cases respectively and these words are followed in all these sections by the words 'and take all such evidence'. The use of the expression 'to hear' and the other expression 'to take such evidence as may be produced' occurring in Section 208(1). Sections 244(1) and 252(1) clearly shows that there is a palpable difference between hearing the complainant and examining him. If the legislature intended that the complainant also should have been examined in support of his complaint it was not necessary to use the word 'hear' with reference to the complainant and the words 'take such evidence' in respect of the witnesses.

In that case the words 'the Magistrate shall proceed to examine the complainant and other witnesses' would have been used instead of the words 'shall proceed to hear the complainant and take such evidence as may be produced.' It is well settled that the legislature never wastes words. It is also a settled principle of construction that significance and meaning must be attributed to every word used by the legislature. The section, as pointed out above, requires that the complainant shall be heard and not examined. The word 'hear' obviously means something other than taking evidence or examination of the complainant.

We find ourselves in complete agreement with the observations made by a Division Bench of this Court (supra). We are also fortified in our view by a decision of the Nagpur High Court in *Mohamudkhan Mahbubkhan v. Emperor* AIR 1945 Nag 127-0(1946) 47 Cri LJ 240) which was referred to by their Lordships of the Division Bench in the aforesaid case. In *Santiram Mandal v. Emperor* AIR 1929 Cal 229 at p. 230 - 30 Cri LJ 942 at p. 943 a Division Bench of the Calcutta High Court observed as follows:

In the first place there is a palpable difference between hearing the complainant and examining him, so that what Section 200 Proviso (aa) means is that the complainant need not be examined on the complaint while Section 244(1), proviso and Section 252(1) proviso mean that he need not be heard, but on the other hand Section 208(1) enjoins that the complainant (if any) shall be heard. It is not the examination of the complainant that is necessary under Section 208(1), but only that he shall be heard.

To the same effect is a decision of the Bombay High Court in Charanjit v. State of Maharashtra, 1971 Maha LJ 311. A Division Bench of the Patna High Court in Kewal Ram v. Emperor AIR 1935 Pat 515 at P. 520 - 3fi Cri LJ 1354 at p. 1359 observed as follows:

A similar objection was raised with reference to Section 252. Cr. P. C. which requires that when the accused appears or is brought before a Magistrate such Magistrate shall proceed to hear the complainant (if any) and shall take all the evidence as may be produced in support of the prosecution. Although the section makes it incumbent upon a Magistrate to hear the complainant (if the latter appears in support of the complaint) it does not, in my opinion, vitiate a conviction in which the complainant has not been examined.

In this case the Patna High Court has clearly held that the hearing of the complaint does not amount to examination so as to vitiate the conviction against the accused.

6. A similar view was taken to re Umayyathantagath AIR 1922 Mad 216 at P. 128 - . ((1922) 23 Cri LJ 203 at p. 204) wherein a Division Bench of the Madras High Court observed as follows:

The next objection taken to the proceedings is that they did not begin with an examination of the complainant by the court. The procedure under Clause 6 of Ordinance III of 1921 dated 5-9-21 is to be that prescribed for warrant cases and no doubt the first incident in the trial of such a case under Section 252 is to be that 'the Magistrate shall proceed to hear the complainant (if any)' the section providing next that 'he shall take all such evidence as may be adduced.' This however in no

way assists the accused's contention that a trial without the examination of the complainant on oath is irregular. The expression used in Section 252 is 'hear the complainant'. The taking of evidence is separately referred to. We have been shown no authority for holding that 'hearing a complainant' involves his examination on oath,

To the same effect is a decision of the Nagpur High Court in 1957 Nag LJ 293.

7. The Mysore High Court also took the same view in the State of Mysore v. Raji AIR 1967 Mys 47 at p. 50 wherein a D. B. of the High Court observed as follows:

It is plain that it was surely not necessary for the prosecution to examine him. Insistence upon the examination of such informants would strike at the very foundation of the possibility of detection of an offence such as the one with which we are concerned in this case and if every one who gives information in the way in which the informant gave it to P.W. 7 is called to give evidence, sources of information would dry up and the task of detection becomes increasingly difficult. There is no principle justifying the view taken by the Magistrate that it was for the prosecution to call the informant in this case.

8. There are two decisions, however, which appear to have taken indirectly a contrary view. In Dhabari v. Gorakh Prasad AIR 1918 Pat 301 (1) - (10 Cri LJ 741) Jawala Prasad, J. was considering the interpretation of the word 'hear' the parties as it appeared in Section 145(4) of the Criminal P. C. The main grievance of the petitioner before the learned Judge was that the Magistrate had not heard the arguments. In this connection the learned Judge held that a refusal to hear the arguments was violative of the provisions of Section 145(4) and the order was set aside on that ground. In this connection Jawala Prasad, J. observed as follows:

Cl. (4), Section 145 clearly provides 'that the Magistrate shall hear the parties.

This includes the argument at the conclusion of the evidence on both sides as the procedure prescribed in Section 244 of the Code for summons trial

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It was further pointed out in the authority quoted above that the Magistrate was wrong in refusing to hear the arguments of pleaders and that it is not improbable that if he had heard their arguments he would have had his attention directed to the point in favour of the petitioner and probably passed a different order from what he has passed in the case.

This case however does not express any view contrary to the one that we have taken in this case. There can be no doubt that the word 'hear' would include not only giving the right of audience to the complainant but also hearing his arguments, if he chooses to advance the same.

9. In *Ghulam Sibtain v. Mt. Kaniz Khatoon* AIR 1920 Pat 383 (1) : (21 Cri LJ 572) it was no doubt observed that the expression 'hear the parties' means hear the evidence of the parties and arguments of the pleaders appearing on their behalf. There was no decision on this point by Sultan Ahmad, J. but he presumed that the word 'hear' would include hearing the evidence of the parties. What is more important to note is that. Sultan Ahmad, J. observed that if 'hear the parties' means hear the evidence of the parties, it did not indicate that the word 'hear' would mean examination of the parties. The learned Judge made the following observations in that case:

Hear the parties' means the evidence of the parties and arguments' of counsel or pleaders appearing on their behalf, or arguments addressed by themselves, and if the Magistrate refuses to hear arguments he is not complying with the provisions of law which are imperative.

These observations have to be read with respect to the peculiar facts of that case. The learned Judge was considering the scope of Section 145(4) which itself provides that the Magistrate has to peruse statements and hear the parties which in the context in which it appears only means that the Magistrate must consider the evidence adduced in the case and hear the arguments of the parties. This case also, therefore, does not lay down any proposition contrary to the one we have laid in this case. For these reasons we are clearly of the opinion that the word 'hear' appearing in Section 252 does not mean that the statement of the complainant should be recorded before he is asked to produce his evidence. It is

sufficient compliance with Section 252 if the Magistrate grants an audience to the complainant, hears his case, and his statement on oath is not necessary. The first point raised by the counsel for the respondent is therefore overruled and the argument of the petitioner on this score is accepted.

10. We now come to the second point which appears to be a more substantial one. Mr. Hussain appearing for the respondents submitted that under Section 135 of the Evidence Act the court had the inherent power to regulate and settle the order of evidence that is to be produced before it. He submitted that the Evidence Act was the general law governing all proceedings whether of a civil or criminal nature. In these circumstances the court was fully within its rights to direct the complainant to be examined as a witness even before the other witnesses were examined. We have given our anxious consideration to this argument but we feel that it is completely devoid of force. In the first place Section 135 of the Evidence Act which runs thus:

The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and in the absence of any such law, by the discretion of the court.

clearly prescribes two conditions for its applicability. In the first place the regulation of evidence must be according to the law or practice which is for the time being in force. Secondly this provision will apply only in the absence of any such law to the contrary. In our opinion none of these conditions applies to the present case. The general practice in criminal courts is that the evidence is taken in the order in which it is produced by the prosecutor and seldom the court interferes with this order. That this practice should be adhered to in criminal cases is even more important for the reason that in a criminal case the entire brunt of proving a prosecution case falls on the prosecutor and it is therefore for him to choose and devise ways and means of proving a case against an accused beyond any doubt, if the courts starts dictating a change in the order, it may lead to serious prejudice and thereby to a serious miscarriage of justice. For instance a prosecutor wants to examine himself as the last witness, but if he is compelled to depose first and depose to all those facts, then it may give an opportunity to the accused to try to

gain over witnesses who have been referred to in the statement of the complainant and in the statement which he has made in his deposition. In these circumstances it is not for the court to play the role of the prosecutor or of the defence. Furthermore Section 252 itself clearly lays down that the Magistrate shall take all such evidence as may be produced in support of the prosecution. The words 'as may be produced' clearly connote that the liberty of determining the order of evidence or production of the same or the choice of the witnesses is entirely that of the prosecutor. This, however, does not mean that the court has got no control over the proceedings. Where the court feels that an important or a material witness has not been examined at all. the court has ample powers under Section 540. Criminal P. C. to summon that witness but this power should be exercised sparingly and at the proper time. We are fortified in this view by a decision of the Calcutta High Court in *Emperor v. Ahirannessa Bibi* AIR 1923 Cal 579' at p. 582 where a Division Bench of that High Court consisting of two eminent Judges observed as follows:

I do not mean to say that it is the duty of the learned Judge, who is trying the case, to dictate to the prosecution the order of the witnesses but it is the discretion of the learned Judge, who has control over the trial, to suggest to these, who are responsible for the conduct of the prosecution, that the proper method and order of calling the witnesses should be observed.

To the same effect is a decision of the Patna High Court in AIR 1943 Pat 424 where their Lordships have held that it is open to the prosecution to examine the witnesses in any order it chooses.

11. The controversy on this matter appears to have been completely settled by a decision of the Supreme Court in *Darya Singh v. State of Punjab* : [1964]3SCR397 , wherein their Lordships observed as follows:

It is well settled that in a murder case, it is primarily for the prosecutor to decide which witnesses he should examine in order to unfold his story

... ..If at the trial it is shown that persons who had witnessed the incident have been deliberately kept back, the court may draw an inference against the

prosecution Mid may. in a proper case, reeard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case. In such a case if the ends of justice require, the court may even examine such witnesses by exercising its powers under Section 540, but to say that in every murder case, the court must scrutinise the police diary and make a list of wit- nesses whom the prosecutor must examine is virtually to suggest that the court should itself take the role of a prosecutor.

12. Reliance was, however, placed on a decision of the Andhra Pradesh High Court in A. P. Sarma v. G. C. Veerayya : AIR 1961 AP420 . It was however a civil case and the principles laid down by their Lordships would not apply to a case where the specific provisions of Section 252 apply in terms. This case, therefore, does not appear to be of any assistance to the respondents.

13. It is true that in the view that we have taken in this case, the order of the learned Magistrate was legally erroneous inasmuch as he had no jurisdiction to compel the examination of the complainant before any evidence could be produced by him, but if the complainant after producing his evidence chooses not to examine himself, the Magistrate at a later stage can certainly summon him as & witness under Section 540, Criminal P. C. which is the main provision for such contingencies.

14. For these reasons, therefore, we allow this petition, set aside the order of the Magistrate by which he has directed the complainant to be examined before production of the other evidence. The Magistrate shall now proceed with the evidence which is produced before him in accordance with law, and in the light of the observations made above. Parties are directed to appear before the Magistrate on 4-9-1974.

Jaswant Singh, J.

15. I agree.

Mian Jalal-Ud-Din, J.

16. I agree.

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