

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.M.C. No. 2258/2011**

% Judgment reserved on: 13th October, 2011
Judgment delivered on: 31st October, 2011

VED PRAKASH Petitioner
Through: Mr. T.L. Garg, Adv.
versus

SRI OM Respondent
Through: Ms. R.P. Kaushik, Adv.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

SURESH KAIT, J.

1 Vide this petition, learned counsel for the petitioner has assailed the summoning order dated 20.01.2005 passed by learned MM in CCNo. 22/03.

2 He has submitted that as per the list of witnesses submitted by the complainant, following were made witnesses in the complaint:-

1. Complainant.
2. Sh. Jagdish Singh

3. Sh. Inderjit.
4. Sh. Dharambir Singh.
5. Sh. Daya Nand.
6. Clerk, from M/s Motor General Finance company.
7. Any other or further witness with the prior permission of the Hon'ble Court.

3 He has further submitted that CW 2 Mr. Raj Singh s/o Late Sh. Subey Singh R/o H.No. 377, Kanjawala, Delhi 81; was examined on 28.09.2004 without being in list of witnesses and on his deposition the aforesaid impugned summoning order was passed.

4 Learned counsel for the petitioner had taken a legal plea that as per the list of witnesses, the complainant in Caluse7 has stated *"any other or further witness with the prior permission of the Hon'ble Court"* whereas CW 2 Raj Singh was examined without the prior permission of the court, which is bad in law.

5 Learned counsel for the petitioner based on the aforesaid submissions has relied upon the judgment **State of Bombay v. Janardhan and others AIR 1960 Bom 513**, wherein it was observed as under:-

".....Witnesses mean only those

mentioned in list under S.204(IA) by complainant. Complainant is restricted to the examination of witnesses whose names are given in the list under section 204(IA).....”.

“.....The object of giving a list of witnesses, as provided in S.204(1A), is to give notice to the accused of the names of the witnesses for the complainant so that accused can prepare for their cross-examination. If witnesses not named in the list referred to in S.204(1A) are allowed to be examined by the complainant the object of the Legislature in adding the new S. 204(IA) would be defeated. After the insertion of S.204(IA), S 256 has to be read along with S. 252 also with S. 204(IA). Therefore, in my opinion, in cases instituted otherwise on a police report the complainant is restricted to the examination of witnesses whose name are given in the list under S. 204(IA).....”

6 Admittedly, the complaint was filed under Section 402/406/506 IPC on 18.11.2000. CW1 Sh. Om was examined in pre-summoning evidence on 06.04.2004.

7 Thereafter, vide order dated 20.01.2005, learned MM passed the impugned summoning order. Thereafter, the case was listed for pre-summoning evidence on 24.10.2010.

8 Facts stated in the complaint relating to offence under Section 506 IPC are mentioned in para 7 of the impugned order, which reads as under:-

“The complaint met with accused 2 and 3 in order to show the letter received from the finance company. These directors declined to pay the instalments as agreed earlier initially and also to pay anything to the complainant in lieu of plying of the vehicle. When the complainant further insisted and stated to approach the authorities and the court for getting justice and money which he invested on the promise and inducement of the accused persons. These aforesaid directors threatened the complainant on 12.12.1998 at the gun point to kill the complainant in case he dared to take any such action stated above. The complainant return back his house and contacted 7 other persons who also invested their money on their promise and inducement by the accused persons like that of the complainant.”

9 Respondent has filed his reply which states that Chapter XV of the Code deals with the complaint made to the Magistrate. It starts with Section 200 which provides that Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) If a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) If the Magistrate makes over the case for inquiry, or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

10 Section 202 of Cr.P.C. provides postponement of issue of process, whereas Section 203 provides dismissal of complaint. Section 204 provides issue of process, whereas sub-clause (2) provides no summons or warrants shall be issued against accused under Section (1) Sub-section (1) until a list of prosecution witnesses have been filed.

11 The Petitioner's main emphasis is that one Raj Singh has been examined in pre-summoning stage, though his name did not find place in the list of witnesses. Thus, so far as the respondent has caused injustice to the petitioner and as such the summoning is bad in law.

12 The second ground taken by the petitioner is that the complainant has not stated anywhere about the petitioner Ved Prakash even though he has been summoned under Section 506 IPC.

13 Further, it is stated, the scheme of Chapter XV of Cr.P.C. is very clear and provides for examination of the complainant and his witnesses after taking cognizance of complaint on oath before the summons are issued to accused persons. It is stated that in the present case, the

complainant was examined along with another witness present in the court at the time of examination.

14 Learned Magistrate examined the witness namely Raj Singh as per provision of Section 200 and thereafter, order for summoning of accused persons.

15 Further, it is stated that the list of witnesses as required under Section 204 (2) Cr.P.C. has also been filed before summons were issued, as such there is no illegality or non compliance of any of the requirement contemplated under Section 204 of Cr.P.C.

16 It is further stated that the purpose of filing of list of witnesses is to make aware the accused persons about the nature of the evidence which may be adduced against them during the proceedings. In the instant case, the witness Raj Singh was also examined in pre-summoning stage, which followed the summoning of the accused. So question of accused persons not knowing the name of the witness namely Raj Singh is not sustainable and as such no prejudice has been caused to accused persons. Moreover, the purpose of the filing of list of witnesses has been served.

17 Learned counsel for the respondent has relied upon a case of **Abdul Hafiz V. GHulam Mohi-ud-din 1997 Cri LJ 591** and **Kanhu Ram V. Durga Ram 1980 Cri LJ 518**, it has been held that omission to file list of witnesses does not vitiate the proceedings if the purpose otherwise is served. The omission is regularly curable under Section 465 Cr.P.C.

18 Further, he has relied upon another Judgment in a case of **Ali Jan V. Amir Khan 1957 Cri LJ 630**, wherein, it has been held that the complainant can file second or even three list of witnesses and non-incorporating any name does not vitiate the proceedings.

19 As relied upon by the learned counsel for the petitioner in the case of **Janardan (supra)** decided by Bombay High Court, wherein it is clearly observed that the object of giving a list of witness as provided in Section 204 (1 A) is to give notice to the accused of the names of the witnesses for the complainant so that the accused can prepare for their cross-examination. If witnesses not named in the list referred to in S. 204 (1A) are allowed to be examined by the complainant the object of the Legislature in adding the new S. 204 (1A) would be defeated. After the insertion of S. 204 (1A), S. 256

has to be read along with S. 252 also with S. 204 (1A), Therefore, the cases instituted otherwise on a police report the complainant is restricted to the examination of witnesses whose names are given in the list under S. 204 (1A).

20 In the present case, the complainant has been examined and one witness CW2, Sh. Raj Singh has also been examined and thereafter, learned Magistrate has issued summons against the petitioner.

21 It has been decided in **Ram Sarup Gupta V. Bishun Narain Inter College and others 1987 2 SCC 555** that in the absence of pleading, evidence if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; pedantic approach should be adopted to defeat justice on

hair –splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence in that event it would not be open to a party to raise the question of absence of pleadings in appeal.

22 As decided by Constitution Bench of Supreme Court in a case of **Bhagwati Prasad V. Chandramaul 1996 2 SCR 286** while considering this question observed as under :-

If a pleas is not specifically ade and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was

not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to another."

under Sub-section (1) until a list of prosecution of witness has been filed.

24 In clause (3), it is enumerated that in a proceeding instituted upon a complaint in writing every summons or warrants issued in Sub section (1) shall be accompanied by a copy of such complaint.

25 In the instant case, learned MM has passed an order on summoning, further summons are to be issued to the accused. It is mandatory that along with the summons, the copy of the complaint of relevant documents and the list of witnesses is required.

26 The petitioner has challenged the order of summoning passed by the learned trial court. The summons are issued to the accused, if the procedure enumerated under Section 204 of Cr.P.C. is not complied with, then it is a defect in issuing the summons against the accused because accused must know what is the complaint and evidence against him.

27 In the instant case, the learned MM has examined complainant and also examined one of the witness namely Raj Singh, therefore, it is in the very much knowledge of the

petitioner/accused that what is the complaint and evidence against him.

28 View taken in a case of **Ghulam Mohd. Vani** ***reported in MANU/JK/004/1971*** (citation to be checked) that non compliance of Section 204(1A) is not an illegality which renders subsequent proceedings null and void but is a curable irregularity.

29 It is further observed that under Section 204(1A), it is statutory proceedings is made in a public interest 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.

30 The single Judge of Calcutta High Court has also observed in **Sunil Akhya Chaudhary V. H.M. Zadwet** reported in ***MANU/WB/00050/1968*** (Citation and parties name to be checked) as held over the intention of Legislature in indicating Section 204(1A) is quite clear. It is that before issuing of summons or warrants against the accused persons, the list of witnesses should be filed before

that point of Charge and need not be when petition/complaint is filed.

31 I am of the opinion that even if filing of the list of witnesses is contemplated by sub-Section (2) of Section 204 and is considered to be mandatory, the provisions contained in Section 465 of 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 Section 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 any error or omission or irregularity in the complaint, summons, warrants, proclamation, order, judgment or every proceedings before or during the trial unless in the opinion of appellant or the revision court if failure of justice is in fact opened occasioned thereby.

32 The issue which is raised by the learned counsel for the petitioner cannot be considered even an error in passing the summoning order. Even in a case where an error in issuing the process is there, even on that basis the complaint cannot

be rejected and cannot be set aside the summoning order passed by the learned MM.

33 Therefore, I am not inclined to interfere in the order, as no infirmity found in the impugned order. It will not result in failure of justice and no prejudice has been caused to the petitioner/accused.

34 Criminal M.C. 2258/2011 is accordingly dismissed.

35 No order as to costs.

SURESH KAIT, J

October 31, 2011

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