

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

Judgment decided on: May 13, 2011

+ **CRL.M.C. NO. 2727/2009**

S.K.BHALLA

....PETITIONER

Through: Petitioner in person.

Versus

STATE & ORS.

....RESPONDENTS

Through: Mr.Sunil Sharma, APP for R-1.
Mr. Anand Singh, Advocate for R-2
to R-4.

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.(ORAL)

1. S.K.Bhalla, the petitioner herein vide this petition under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure is seeking following prayer:

“(a) To call for the record of both the courts below and thereafter;

(b) To kindly, may be pleased to interfere in the impugned orders and to correct the mistake committed by both the courts below by setting aside the orders passed by them and by issuing directions to decide the case on merits according to law”.

2. The facts leading to this petition are that the petitioner is the owner of House No. XVI/70, Gali No. 2, Joshi Road, Karol Bagh. Respondent No. 2 in June, 2005, purchased a nearby property i.e. half of the house being House No. XVI/72, Gali No. 3, Joshi Road, Karol Bagh, New Delhi. In May 2006, respondent No. 2 with the assistance of respondents No. 3 & 4 demolished the existing structure at property No. XVI/72, Joshi Road, Karol Bagh and raised new construction. He opened two windows at the first floor of the construction. The windows overlooked the courtyard of the property of the petitioner. Petitioner protested against opening of the windows and on his request, respondent No. 2 converted one of those windows into a ventilator. The petitioner was not satisfied and he insisted on closing of the window as well as the ventilator. When the respondents refused to oblige, petitioner filed a criminal complaint under Section 509/109 IPC.

3. Learned M.M., in exercise of his powers under Section 156(3) CrPC directed the local police station to register and investigate the case. Accordingly, FIR No. 465/2006 was registered at Police Station D.B.Gupta Road. Pursuant to the investigation, charge sheet was filed against the respondents No. 2 to 4. Learned M.M. directed the complaint filed by the petitioner to be clubbed with the charge sheet and took cognizance of the offence.

4. Learned M.M. vide his order dated 25th November, 2008 discharged the respondents No. 2 to 4, observing that no case under Sections 509/109 IPC was made out. Feeling aggrieved, the petitioner preferred a revision petition in the court of Sessions. His revision petition was dismissed by learned Additional Sessions Judge vide order dated 29th May, 2009.

5. Feeling aggrieved by the impugned order of learned Additional Sessions Judge, the petitioner has approached this court.

6. Grievance of the petitioner is that neither learned M.M. nor learned Additional Sessions Judge have understood the true import of Section 509 IPC. Petitioner submitted that the opening of windows by the respondents, at first floor level, overlooking the courtyard of house of the petitioner impinges upon the privacy and modesty of the female members of his family as those ladies cannot freely move around or talk or gossip in the courtyard because of the fear of anyone peeping through the window/ventilator opened at first floor level by the respondents No. 2 to 4. Thus, the petitioner has submitted that the refusal of respondent No. 2 to close the window and the ventilator amounts to a deliberate act of insulting the modesty of female members of the petitioner's family and it also amounts to intruding upon their privacy, which is an offence as defined under Section 509 IPC. Thus, it is contended that the Trial

Court ought not have discharged respondents No. 2 to 4. In support of this contention, petitioner has relied upon the judgment of Kerala High Court in the matter of **M.M.Haries Vs. State of Kerala, 2005 (4) R.Cr.R. 579**. In the said case, the question before the Hon'ble Judge of Kerala High Court was whether writing an obscene and vulgar letter and addressing the same to a woman would fall within the purview of Section 509 IPC and the Hon'ble Judge, after discussing the scope of expression making gesture held that 'writing of said letter would amount to an offence under Section 509 IPC'. In the said judgment, however, not much has been said about the intention as one of the basic ingredients constituting the offence under Section 509 IPC.

7. The petitioner has also relied upon the judgment of Supreme Court in **Tarkeshwar Sahu Vs. State of Bihar, 2006 (3) JCC 1735**. On careful reading of the aforesaid judgment, it transpires that the judgment, instead of helping the petitioner, goes against him. In the judgment, the Supreme Court has categorically observed thus:

"33. So far as the offence under Section 354 IPC is concerned, intention to outrage the modesty of the women or knowledge that the act of the accused would result in outraging her modesty is the gravamen of the offence.

34. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex".

8. On reading of the above, it is obvious that intention to outrage the modesty of a woman is an essential ingredient of offence under Section 354 IPC. Language of Section 509 IPC, which also deals with the offence of insulting the modesty of a woman is also similar to Section 354 IPC.

9. Section 509, IPC reads thus:

“509. Word, gesture or act intended to insult the modesty of a woman--

Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both”.

10. On reading of Section 509 IPC, it is apparent that in order to bring an act committed by a person within the purview of Section 509 IPC, the act must have been committed with the intention to insult the modesty of any woman or to intrude upon the privacy of such woman. Thus, intention is the basic ingredient of the offence under Section 509 IPC. Only allegation against the respondents No. 2 to 4 in the complaint as well as charge sheet is that respondents No. 2 to 4 have opened window and a ventilator, overlooking the courtyard of the house of the petitioner at the first floor of his property. There is no allegation whatsoever that the window and the ventilator were opened with the intention to insult the modesty

of woman folk of the petitioner's family or to intrude upon their privacy. If a person opens a window or ventilator in his property to ensure light and ventilation, it cannot be said to be an act intending to violate the privacy of woman folk of the neighbour or to insult their modesty. There is no allegation that aforesaid window/ventilator were used by anyone for any oblique purpose. Therefore, in my considered view, the learned M.M. as well as the revisional court has rightly concluded that the essential ingredient of offence under Section 509 IPC i.e. intention to insult the modesty of woman is lacking in this case. Thus, the order of learned M.M. discharging respondents No. 2 to 4 at the stage of serving of notice under Section 251 CrPC and the dismissal of revision petition against said order vide impugned order dated 29th May, 2009 cannot be faulted.

11. Petitioner also submitted that the Magistrate, after having taken cognizance of offence and issuing processes for appearance against the respondents No. 2 to 4, in view of the judgment of Supreme Court in **Adalat Prasad Vs. Rooplal Jindal & Ors., (2004) 7 SCC 338** had no powers to discharge the respondents No. 2 to 4 at the stage of notice under Section 251 CrPC, as such, an order amounts to the review of the earlier order of having taken cognizance of the offence.

12. The above contention of the petitioner is misconceived and based on misreading of the judgment of Supreme Court in Adalat Prasad Case (supra). In the said case, pursuant to an enquiry conducted in a complaint under Sections 120A, 120B, 405, 406, 415, 420, 463, 465 & 468 IPC, learned Metropolitan Magistrate took cognizance of the complaint and issued process under Section 204 CrPC against the accused persons for offences confined to Section 420 read with Section 120B IPC. Being aggrieved by the issue of process, some of the accused moved High Court and the High Court directed them to move the Trial Court against the summoning order. Pursuant to the said order of the High Court, accused persons moved application under Section 203 CrPC on 10.3.1993 and the learned Magistrate, vide order dated 28.1.1995 recalled the order issuing summons after hearing the parties. The aforesaid order to recall summons issued under Section 204 CrPC was challenged in High Court and the High Court allowed the revision petition holding that the Trial Court erred in recalling the consequential summons issued because the said court did not have power to review its own order. Accused persons preferred SLP against said order and the Supreme Court, while upholding the order of the High Court, inter alia, observed thus:

“12. Will examine the above findings of this Court in the background of the scheme of the Code which provides for consideration of complaints by Magistrates and commencement of

proceedings before the Magistrate which is found in Chapters XV and XVI of the Code;

13. Section 200 contemplates a Magistrate taking cognizance of an offence on complaint to examine the complaint and examine upon oath the complainant and the witnesses present if any. If on such examination of the complaint and the witnesses, if any, the Magistrate if he does not want to postpone the issuance of process has to dismiss the complaint under section 203 if he comes to the conclusion that the complaint, the statement of the complainant and the witnesses has not made out sufficient ground for proceeding. Per contra if he is satisfied that there is no need for further inquiry and the complaint, the evidence adduced at that stage has materials to proceed, he can proceed to issue process under Section 204 of the Code Section 202 contemplates: postponement of issue of process : It provides that if the Magistrate on receipt of a complaint if he thinks fit, to postpone the issuance of process against the accused and desires further inquiry into the case either by himself or directs an investigation to be made by a Police Officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding, he may do so. In that process if he thinks it fit he may even take evidence of witnesses on oath, and after such investigation, inquiry and the report of the Police if sought for by the Magistrate and if he finds no sufficient ground for proceeding he can dismiss the complaint by recording briefly the reasons for doing so as contemplated under section 203 of the Code.

14. Section 202 contemplates; postponement of issue of process: It provides that if the Magistrate on receipt of a complaint if he thinks fit, to postpone the issuance of process against the accused and desires further inquiry into the case either by himself or directs an investigation to be made by a Police Officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding, he may do so. In that process if he thinks if fit he may even take evidence of witnesses on oath, and after such investigation inquiry and the report of the Police if sought for by Magistrate and if he finds no sufficient ground for proceeding he can dismiss the complaint by recording briefly the reasons for doing also as contemplated under section 203 of the Code.

15. But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under section 204 of the Code. Therefore what is necessary or a condition precedent for issuing process under section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under

section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in Mathew's case before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under sections 200 and 202, and the only stage of dismissal of the complaint arises under section 203 of the Code at which stage the accused has no role to play therefore the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint under section 203 of the Code for a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.

16. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of Sections 200 & 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of Code.

13. From the above, it is obvious that the Supreme Court has held that once a process under Section 204 CrPC has been issued, the Trial Court cannot revert back to the stage of Section 203 CrPC and recall the issue of process against the accused as the Trial Court has no powers to review under the Code of Criminal Procedure.

14. The facts of this case are distinct from the facts of Adalat Prasad Case (supra). In Adalat Prasad case (supra), learned Metropolitan Magistrate had recalled the summoning order by allowing the application under Section 203 CrPC after the issue of

process under Section 204 CrPC. However, in the instant case, respondents No. 2 to 4 have been discharged by the learned Trial Court at the stage of serving of notice under Section 251 CrPC. At this subsequent stage, learned Metropolitan Magistrate was of the view that the charge sheet/complaint did not disclose necessary ingredient of the offence under Section 509 IPC, as such, he discharged the respondents No. 2 to 4 for the commission of abetment of offence under Section 509 IPC.

15. Section 251 of the Code of Criminal Procedure deals with the stage subsequent to issue of process under Section 204 CrPC in a summons trial case. This section casts a duty upon the Magistrate to state to the accused person the particulars of offence allegedly committed by him and ask him whether he pleads guilty. This can be done by the Magistrate only if the charge sheet/complaint/preliminary evidence recorded during enquiry disclose commission of a punishable offence. If the charge sheet/complaint does not make out a triable offence, how can a Magistrate state the particulars of non-existing offence for which the accused is to be tried. Therefore, it is inherent in Section 251 of the Code of Criminal Procedure that when an accused appears before the Trial Court pursuant to summons issued under Section 204 CrPC in a summons trial case, it is bounden duty of the Trial Court to carefully go through the allegations made in the charge

sheet/complaint and consider the evidence to come to a conclusion whether or not, commission of any offence is disclosed and if the answer is in the affirmative, the Magistrate shall explain the substance of the accusation to the accused and ask him whether he pleads guilty, otherwise, he is bound to discharge the accused.

16. The petitioner further submitted that the order of the Magistrate discharging the respondents No. 2 to 4 is violative of Section 258 of the Code of Criminal Procedure. The argument, in my view is misconceived. Perusal of the order of learned M.M. and the impugned order of the revisional court clearly show that learned M.M. has discharged respondents No. 2 to 4 because the charge sheet/complaint did not disclose the commission of the offence under Section 509 IPC. The discharge order was passed at the stage of Section 251 CrPC and the concerned Magistrate has not resorted to Section 258 CrPC. Thus, the submission of the petitioner in this regard is devoid of merit.

17. It is pertinent to note that petitioner admittedly has filed a suit for mandatory injunction to clear the window and ventilator in the Civil Court. The complaint appears to have been filed by the petitioner/complainant with the mala fide intention to pressurize them to settle the civil dispute. This conduct of the

petitioner/complainant is gross abuse of process of law. Therefore also, the petition is likely to be dismissed.

18. In view of the discussions above, I do not find any infirmity or illegality in the order of learned Additional Sessions Judge, which may call for interference by this court in revisional jurisdiction under Section 482 CrPC.

19. Petition is accordingly dismissed.

(AJIT BHARIHOKE)
JUDGE

MAY 13, 2011

akb