

Court No. - 16

Case :- CRIMINAL MISC. WRIT PETITION No. - 1003006 of 1997

Petitioner :- Ram Murti Sharma And Others

Respondent :- Vii Addl. District Judge Faizabad And Others

Counsel for Petitioner :- Rakesh Pathak

Counsel for Respondent :- C.S.C.,S.L.Mishra

Hon'ble Shamim Ahmed,J.

1. List has been revised.
2. No one appeared on behalf of respondent No.3 even in the revised call.
3. Vakalatnama filed today in the Court by Shri Anand Mani Tripathi, Advocate on behalf of the petitioners is taken on record.
4. Heard Shri Anand Mani Tripathi, learned Counsel for the petitioners, Shri Ashok Kumar Singh, learned A.G.A-I for respondent Nos.1 and 2.
5. This Criminal Misc. Writ Petition has been filed on behalf of the petitioners with following main prayers:-

"i) issue a writ, order or direction in the nature of Certiorari quashing the orders dated 15.11.1997 and 05.07.1996 and 23.09.1995 passed by VIIth Additional District Judge, Faizabad and Additional Chief Judicial Magistrate IVth, Faizabad contained in Annexure Nos.6 and 4 and 2 respectively to this writ petition.

ii)...

iii)..."
6. Learned Counsel for the petitioners submits that the petitioner are innocent and have been falsely implicated in the present case and were summoned to face trial by learned court below without following the due process established by law and consequential orders were also passed without considering the evidence and material on record.
7. Learned Counsel for the petitioners further submits that initially the F.I.R. was lodged by respondent No.3 under Sections 147, 323, 504 and 506 I.P.C., which was registered as

Case Crime No.53/1994, Police Staiton-Raunahi, District-Faizabad (now Ayodhya), thereafter, the matter was investigated thoroughly and after investigation the Investigating Officer did not find any evidence against the petitioners and submitted the final report in the court concerned. He further submits that thereafter at the time of acceptance of final report the complainant-respondent No.3 in the present case moved an application for setting aside the final report submitted by the police in the form of a protest petition.

8. Learned Counsel for the petitioners further submits that learned Civil Judge, Junior Division, Faizabad (now Ayodhya) without considering the material placed on record and without recording the evidence under Section 200 and 202 Cr.P.C. allowed the application/protest petition filed by the respondent No.3 vide order dated 23.09.1995 and summoned the petitioners to face trial. He further submits that the summoning order is bad in the eye of law as no evidence was recorded under Section 200 and 202 Cr.P.C., thus, the procedure established by law was not followed by the court below while passing the summoning order.

9. Learned Counsel for the petitioners further submits that being aggrieved by the summoning order dated 23.09.1995, the petitioners moved an application for setting aside the summoning order and for discharging them from the alleged offences, thereafter, learned Additional Chief Judicial Magistrate IVth heard the petitioners and vide order dated 05.07.1996 rejected the application in a cursory manner without considering the legal position of the case in hand.

10. Thereafter, aggrieved by the order dated 05.07.1996 passed by learned Additional Chief Judicial Magistrate IVth, the petitioners preferred a revision before the Sessions Judge, Faizabad (now Ayodhya) under Section 397 Cr.P.C. for cancellation of the summoning order with a prayer that the trial court may be directed to consider the contention of the petitioners regarding the validity of the order impugned therein, thereafter, the revisional court without considering the case established by the petitioners dismissed the revision vide order dated 15.11.1997 and the order is totally non speaking and has been passed without application of mind.

11. Learned Counsel for the petitioners further submits that the impugned orders passed by the courts below are passed in a cursory manner without considering the legal position and the mandatory provision of recording the evidence under Section 200 and 202 Cr.P.C., which has not been followed in the present case and the petitioners were directed to face trial.

12. In support of his arguments, learned Counsel for the petitioners places reliance on paragraph No.22 of the judgment of Hon'ble Apex Court in the case of **S.K. Sinha, Chief Enforcement Officer vs. Videocon International Ltd. and Others reported in (2008) 2 SCC 492**. Paragraph No.22 of the aforesaid judgment is reproduced hereunder:-

"22. Chapter XV (Sections 200-203) relates to Complaints to Magistrates and covers cases before actual commencement of proceedings in a Court or before a Magistrate. Section 200 of the Code requires a Magistrate taking cognizance of an offence to examine the complainant and his witnesses on oath. Section 202 however, enacts that a Magistrate is not bound to issue process against the accused as a matter of course. It enables him before the issue of process either to inquire into the case himself or direct an investigation to be made by a Police Officer or by such other person as he thinks fit for the purpose of deciding whether there is sufficient ground for proceeding further. The underlying object of the inquiry under Section 202 is to ascertain whether there is prima facie case against the accused. It thus allows a Magistrate to form an opinion whether the process should or should not be issued. The scope of inquiry under Section 202 is, no doubt, extremely limited. At that stage, what a Magistrate is called upon to see is whether there is sufficient ground for proceeding with the matter and not whether there is sufficient ground for conviction of the accused."

13. Further, learned Counsel for the petitioners places reliance on paragraph Nos. 10, 11 and 12 of the judgment of the Hon'ble Apex Court in the case of **Rosy and Another vs. State of Kerala and Others reported in (2000) 2 SCC 230**. Paragraph Nos.10, 11 and 12 of the aforesaid judgment is reproduced hereunder:-

"10. It is only if the Magistrate decides to hold the inquiry the proviso to sub-section (2) of Section 202 would come into operation. If the offence is triable exclusively by the court of Sessions, the Magistrate himself has to hold the inquiry and no direction for investigation by police shall then be made. Inquiry can be held for recording evidence on oath and if he thinks fit. Sub-section (2) of Section 202 gives discretion to the Magistrate to record evidence of witnesses on oath. To this discretionary power, the proviso carves out an exception. It provides that for the offence triable exclusively by the court of Session the Magistrate shall call upon the complainant to produce all his witnesses and examine them on oath. Then the next stage after holding inquiry is passing of appropriate order of either dismissal of the complaint or issue of process. That is provided under Section 203 and 204 of the Code. Hence, on receipt of the complaint, the Magistrate by following the procedure prescribed under Section 200 may issue process against the accused or dismiss the complaint. Section 203 specifically provides that after considering the statement on oath, if any, of the complainant and witnesses and the result of the inquiry or investigation, if any, under Section 202, the Magistrate is of the

opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint. For dismissal of complaint, he is required to briefly record his reasons for so doing. In other cases, he has to issue process i.e. either summons or warrants as the case may be as provided under Section 204. However, no summons or warrant is to be issued against the accused until a list of the prosecution witnesses has been filed. Therefore, the question of complying with the proviso to sub-section (2) of Section 202 would arise only in cases where the Magistrate before taking cognizance of the case decides to hold the inquiry and secondly in such inquiry by him, if he decides to take evidence of witnesses on oath. But the object and purpose of holding inquiry or investigation under Section 202 is to find out whether there is sufficient ground for proceeding against the accused or not and that holding of inquiry or investigation is not an indispensable course before issue of process against the accused or dismissal of the complaint. It is an enabling provision to form an opinion as to whether or not process should be issued and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath.

11. In a case, *Ranjit Singh v. The State of Pepsu* (now Punjab, AIR (1959) SC 843, where the Sub-Inspector of Police was convicted under Section 193 IPC by First Class Magistrate, it was contended that the procedure adopted by the Magistrate was erroneous because he did not hold an enquiry as required under Sections 200 and 202 of the Code. This Court negatived the said contention and held thus :

"That contention is equally untenable because under Section 200 proviso (aa) it is not necessary for a Magistrate when a complaint is made by a Court to examine the complainant and neither Section 200 nor Section 202 requires a preliminary enquiry before the Magistrate can assume jurisdiction to issue process against the person complained against."

Further, it is settled law that the inquiry under Section 202 is of limited nature. Firstly, to find out whether there is prima facie case in issuing process against the person accused of the offence in the complaint and secondly, to prevent the issue of process in the complaint which is either false or vexatious or intended only to harass such a person. At that stage, the evidence is not to be meticulously appreciated, as the limited purpose being of finding out "whether or not there is sufficient ground for proceeding against the accused". The standard to be adopted by the Magistrate in scrutinising the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202 Cr.P.C. accused has no right to intervene and that it is the duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. (*Re : Chandra Deo Singh v. Prakash Chandra Bose & Anr.*, *Vadilal Panchal v. Dattatraya Dulail Ghadigaonker*, *Pramatha Nath Talugdar v. Saroj Ranjan Sarkar*, *Nimaljit Singh Hoon v. The State of W.B. and Mohinder Singh vs. Gulwant Singh*).

12. This Court in *Kewal Krishan v. Suraj Bhan* dealt with the case where instead of finding out prima facie case made out against the accused, the Magistrate passed an order by meticulously appreciating the evidence in a case exclusively triable by a Sessions Court, at the stage of Sections 203 and 204. The Court held that the Magistrate committed an irregularity by exceeding his jurisdiction and observed thus :

"At the stage of Sections 203 and 204, Criminal Procedure Code in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see "whether on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under Sections 200 and 202. Criminal Procedure Code, there is prima fade evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is "sufficient ground for proceeding against the accused."

The Court further made it clear thus :

"At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial Court. The standard to be adopted by the Magistrate in scrutinising the evidence is not the same as the one which is to be kept in view at the stage of framing charges. The standard of proof and judgment, which is to be applied finally before finding the accused guilty or otherwise is not exactly to be applied at the stage of framing charges. A fortiori, at the stage of Sections 202/204, if there is prima fade evidence in support of the allegations in the complaint relating to a case exclusively triable by the Court of Session, that will be a sufficient ground for issuing process to the accused and committing them for trial to the Court of Session." "

14. Further, learned Counsel for the petitioners places reliance on paragraph Nos.12 and 14 of the judgment of the Hon'ble Apex Court in the case of ***Shivjee Singh vs. Nagendra Tiwary and others reported in Criminal Appeal No.1158 of 2010 (Arising out of SLP (Crl.) No.1416 of 2009)***. Paragraph Nos.12 and 14 of the aforesaid judgment is reproduced hereunder:-

"12. The use of the word 'shall' in proviso to Section 202(2) is prima facie indicative of mandatory character of the provision contained therein, but a close and critical analysis thereof along with other provisions contained in Chapter XV and Sections 226 and 227 and Section 465 would clearly show that non examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the concerned Magistrate of the jurisdiction to pass an order for taking cognizance and issue of process provided he is satisfied that prima facie case is made out for doing so. Here it is significant to note that the word 'all' appearing in proviso to Section 202(2) is qualified by the word 'his'. This implies that the complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of

process. The choice being of the complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at the trial and not at the stage of issuing process when the Magistrate is not required to enter into detailed discussions on the merits or demerits of the case, that is to say whether or not the allegations contained in the complaint, if proved, would ultimately end in conviction of the accused. He is only to see whether there exists sufficient ground for proceeding against the accused.

14. Although, Shah, J. and Thomas, J. appear to have expressed divergent views on the interpretation of proviso to Section 202(2) but there is no discord between them that non examination of all the witnesses by the complainant would not vitiate the proceedings. With a view to clarify legal position on the subject, we deem it proper to observe that even though in terms of the proviso to Section 202(2), the Magistrate is required to direct the complainant to produce all his witnesses and examine them on oath, failure or inability of the complainant or omission on his part to examine one or some of the witnesses cited in the complaint or whose names are furnished in compliance of the direction issued by the Magistrate, will not preclude the latter from taking cognizance and issuing process or passing committal order if he is satisfied that there exists sufficient ground for doing so. Such an order passed by the Magistrate cannot be nullified only on the ground of non-compliance of proviso to Section 202(2)."

15. Lastly, learned counsel for the petitioners places reliance on paragraph Nos.7 and 10 of the judgment of this Court in the case of **Pakhandu and others vs. State of U.P. and Others reported in 2001 ALL. L.J. 2798**. Paragraph Nos. 7 and 10 of the aforesaid judgment is reproduced hereunder:-

"7. Chapter XIV of the Code of Criminal Procedure deals with the conditions requisite for initiation of proceedings. For the purpose of this case, we are concerned with Section 190(1) alone which is reproduced below:

190. Cognizance of offences by Magistrate :- (1) Subject to the provisions of this Chapter and Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf under Sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

10. The other course open to the Magistrate is that instead of taking cognizance, he may send the complaint/application under Section 156(3), Cr.P.C. for police investigation. If the course is adopted, the police will have to investigate the matter as per the

procedure laid down in Section 157 onwards. If upon investigation the police came to the conclusion that there was no sufficient evidence or any reasonable ground of suspicion to justify the forwarding of accused for trial and submitted final report for dropping the proceedings, following courses are open to the Magistrate and he may adopt any one of them as the facts and circumstances of the case may require :

(I) He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant;

(II) He may take cognizance under Section 190(1)(b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed;

(III) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or

(IV) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190(1)(a) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202, Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued."

16. Learned Counsel for the petitioners submits that the ratio of laws laid down by Hon'ble Apex Court and this Court which are cited above are applicable in the present case also, the entire proceedings initiated against the petitioners is liable to be set aside as due process established by law has not been followed in the present case while summoning the petitioners to face trial, therefore, the summoning order is totally bad in the eye of law, thus, the impugned orders dated 15.11.1997, 05.07.1996 as well as order dated 23.09.1995 may be set aside and the present petition may be allowed.

17. Per contra, learned A.G.A-I opposed the contentions made by learned Counsel for the petitioners and submits that prima facie offence is made out against the petitioners, the summoning order is legally correct and no interference by this Court is required in the present case, thus, he submits that the present petition may be dismissed.

18. After considering the arguments advanced by learned Counsel for the parties and after going through impugned orders, it transpires that without recording evidence under Section 200 and 202 Cr.P.C. learned Magistrate had summoned the petitioners to face trial which is against the mandate of law settled by Hon'ble Apex Court in the judgments referred above

has observed that before summoning the accused, it is mandatory for the magistrate to record evidence under Section 200 and 202 Cr.P.C. In the present case learned Magistrate has totally failed to appreciate the legal aspect of the case and revisional court has also erred to appreciate the legal question involved in the present case, further learned Civil Judge, Junior Division, Faizabad (now Ayodhya) also without considering the material placed on record and without recording the evidence under Section 200 and 202 Cr.P.C. allowed the application/protest petition filed by the respondent No.3 vide order dated 23.09.1995, thus, it transpires that the courts below have passed the impugned orders in a cursory manner.

19. It is further observed that the standard to be adopted by the Magistrate in scrutinizing the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202 Cr.P.C. accused has no right to intervene and that it is the duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made.

20. It is further observed that instead of finding out prima facie case made out against the accused, the Magistrate passed an order by meticulously appreciating the evidence in a case exclusively triable by a Sessions Court, at the stage of Sections 203 and 204. The standard of proof and judgment, which is to be applied finally before finding the accused guilty or otherwise is not exactly to be applied at the stage of framing charges. A fortiori, at the stage of Sections 202/204.

21. Thus, this Court is satisfied with the arguments advanced by learned Counsel for the petitioners and the judgments referred above. The impugned orders dated 15.11.1997, 05.07.1996 and 23.09.1995 were passed ignoring the legal questions.

22. In view of the discussions and observations and judgments referred above, the impugned orders are liable to be set aside.

23. Accordingly, the orders dated 15.11.1997, 05.07.1996 and 23.09.1995 passed by VIIth Additional District Judge, Faizabad (now Ayodhya), Additional Chief Judicial Magistrate IVth, Faizabad (now Ayodhya) and Civil Judge, Junior Division, Faizabad (now Ayodhya) are **set aside** and reversed, in pursuance thereto further proceedings are also **quashed**, consequently, the present petition is hereby **allowed**.

Order Date :- 5.1.2024/Piyush/-