

## Ajai Pal and Others Vs State of U.P. and Another

**Court:** Allahabad High Court (Lucknow Bench)

**Date of Decision:** April 5, 2013

**Citation:** (2013) 5 ALJ 556

**Hon'ble Judges:** Vishnu Chandra Gupta, J

**Bench:** Single Bench

**Advocate:** Sunil Kumar Singh, for the Appellant;

### Judgement

@JUDGMENTTAG-ORDER

Vishnu Chandra Gupta, J.

This petition u/s 482 of Criminal Procedure Code (for short "Cr.P.C.") has been filed to set aside the order

dated 07.01.2011 passed by Additional Chief Judicial Magistrate, Court No. 2, Hardoi in complaint Case No. 4102 of 2011 summoning the

petitioners to face the trial under Sections 452, 323, 504, 506, IPC, P.S. Pachdevra, District Hardoi and order dated 25.02.2013 passed by

Additional Civil Judge (S.D)/ACJM, Hardoi in complaint Case No. 291 of 2011 (relating to same complaint case) by which the court below has

rejected the prayer for discharge made u/s 245(2) of Cr.P.C. Brief facts for deciding this petition are that opposite party No. 2 Smt. Mayawati

moved an application u/s 156(3), Cr.P.C. This application was treated as complaint and after recording the statement under Sections 200 and

202, Cr.P.C., the court took cognizance and issued the process against the petitioners/accused persons vide order dated 07.01.2011 (Annexure 1

to the petition). For default in appearance in compliance if process issued against the petitioners, non-bailable warrants were issued. Thereafter

petitioners without appearing before the court moved an application through counsel alleging it to be u/s 245 (2), Cr.P.C., for their discharge. The

court vide its order dated 25.02. 2013 (Annexure-2 to this petition) after observing that accused yet not appeared and also there is no grounds to

discharge the accused on the basis of material on record, dismissed the application purported to be given u/s 245(2), Cr.P.C. and accused

persons were again summoned by issuing non-bailable warrants to appear in the court.

2. I have heard the learned counsel for the petitioner and learned AGA. This Court is of the view that this petition can be disposed of at the

admission stage without issuing any notice to private opposite party No. 2, the complainant.

3. Moot question for consideration before this Court is,

Whether an accused have any right to challenge the order of issuing process against him before the Magistrate without putting his appearance

during trial by moving an application u/s 245(2), Cr.P.C. on the basis of material available before the Magistrate at the time of passing the order u/s

204, Cr.P.C.?

4. To understand the controversy, it is necessary to keep in mind that a party cannot be allowed to do indirectly what he can do directly or cannot

do at all.

5. It is well settled law that the Magistrate cannot recall its own order of issuing process u/s 204, Cr.P.C., against the accused on his pretext in

view of the bar contained in Section 362, Cr.P.C. The aforesaid proposition of law has been settled in Adalat Prasad Vs. Rooplal Jindal and

Others, and Subramaniam Sethuraman Vs. State of Maharashtra and Another, . In Adalat Prasad's case (supra) the Apex Court held that the law

laid down in the case of K.M. Mathew Vs. State of Kerala and another, is not a good law and held that Magistrate cannot recall its own order

issuing process against the accused u/s 204, Cr.P.C.

6. In Dhariwal Tobacco Products Ltd. and Others Vs. State of Maharashtra and Another, , the Supreme Court affirmed the aforesaid principle of

law as held in Adalat Prasad's case (supra). However, it was held that the order issuing process passed u/s 204, Cr.P.C., is not an interlocutory

order and the order passed u/s 204 is revisable u/s 397 /401 of the Cr.P.C.

7. In view of the provisions contained in section 362, Cr.P.C. and also in view of the law discussed above the petitioners were entitled to challenge

the order passed u/s 204, Cr.P.C. before a higher forum by filing revision u/s 397 read with section 401, Cr.P.C. and before the Magistrate.

8. Now, it is necessary to look into the statutory provision contained in the Cr.P.C. to test the correctness of the orders challenged in this petition.

9. Chapter XIX of Cr.P.C. deals with procedure of trial of warrant cases by the Magistrate. When warrant case is based on other than police

report i.e. on complaint the procedure prescribed in Section 244, Cr.P.C. is the starting point which is reproduced herein below:

244 Evidence for prosecution. (1) When, in any warrant-case instituted otherwise than on a police report, the accused appears or is brought

before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the

prosecution.

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any

document or other thing.

10. Section 244, Cr.P.C. clearly provides that first step towards start of warrant trial is the appearance of accused. This is clear from words used

in section 244 ""when accused appears or is brought before a Magistrate"".

11. Section 245 comes after section 244 is also reproduced herein below:

245. When accused shall be discharged.

(1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the

accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to

be recorded by such Magistrate, he considers the charge to be groundless.

12. As such the Magistrate after fulfilling the requirement of section 244 shall proceed further to hear the prosecution and took all such evidence as

may be produced by the prosecution in support of its case. Section 245, Cr.P.C. has two parts. First part relates when entire evidence u/s 244,

Cr.P.C., has been recorded and the second part relates to power of the Magistrate to discharge any accused at any previous stage of the case if,

for the reasons to be recorded, he considers the charge to be groundless. This power of Magistrate to discharge an accused undisputedly could be

invoked during trial. To reach the stage of Section 245, Cr.P.C. it is necessary that trial must have begun. The trial begins in view of Section 244,

Cr.P.C., when accused appears or is brought before the Magistrate.

13. How accused appears or is brought before the Magistrate is to be considered in the light of provisions contained in Code of Criminal

Procedure. During trial accused may be arrested by police in pursuance of a non-bailable warrant issued by the Magistrate or he may surrender

before Magistrate u/s 436 or 437, Cr.P.C., as the case may be. Sections 436, 437 and 439, Cr.P.C. deals with provisions of bail after arrest or

surrender by an accused. Section 438 Cr.P.C. relates to anticipatory bail to an accused but the same is not applicable to the State of U.P. in view

of U.P. Act No. 16 of 1976 w.e.f. 28.11.1996, by which the provision u/s 438, Cr.P.C. were omitted. In view of aforesaid provisions of bail, it is

necessary that the accused person should be in custody at the time of consideration of his bail, if accused appears or is brought before the

Magistrate in the aforesaid manner the warrant trial shall proceed in complaint case as mentioned in Section 244, Cr.P.C.

14. It is true that in view of Section 245(2), Cr.P.C. the Magistrate is empowered to pass an order of discharge for reasons to be recorded after

appearance of the accused and before recording the evidence u/s 244, Cr.P.C. or during the course of proceedings pending for recording the

evidence u/s 244, Cr.P.C., but the Magistrate is not empowered to entertain any application u/s 245(2), Cr.P.C., unless the accused appeared or

brought before the court within the ambit of Section 244, Cr.P.C., Section 244 and 245, Cr.P.C., are part of the same scheme. Hence, it cannot

be said that accused without putting his appearance before the court may participate in any proceedings or trial pending before a competent court.

15. Section 273, Cr.P.C., provides that all evidence taken in the course of trial or other proceeding shall be conducted in the presence of the

accused, or, when personal attendance is dispense with, in the presence of his pleader.

16. All these sections makes it mandatory that the trial could only begun when the accused appears or brought before the court in pursuance of an

order passed u/s 204, Cr.P.C. Section 245, Cr.P.C. is part of the procedure relating to trial of warrant cases, is clear from the heading of Chapter

XIX of Cr.P.C. "Trial of warrant cases by Magistrate". Therefore this court is of the firm view that accused cannot invoke the jurisdiction u/s

245(2) Cr.P.C., unless he appears or brought before the Magistrate.

17. Moreover in view of bar contained u/s 362, Cr.P.C. the Magistrate cannot recall his order passed u/s 204, Cr.P.C. Therefore, under the garb

of Section 245(2), Cr.P.C. the bar contained u/s 362, Cr.P.C. cannot be allowed to lift and that too without appearance of the accused and

without participation in the trial. If court permits the accused to move petition u/s 245(2) without putting his appearance during trial to challenge the

order passed u/s 204, Cr.P.C. on the similar material and recall its own order it will be bad in law for want of jurisdiction in the light of section

362, Cr.P.C. and also the law laid down by the Apex Court in Adalat Prasad Vs. Rooplal Jindal and Others, , Subramaniam Sethuraman Vs.

State of Maharashtra and Another, and Dhariwal Tobacco"s case (supra).

18. It is permissible to an accused in law that he after appearing himself as stated above before trial court may directly move the application u/s

245(2), Cr.P.C., therefore, he cannot be allowed to move such application without appearing and participating in the trial. Section 245(2),

Cr.P.C., is a provision which empowers the Magistrate in appropriate cases, for reasons to be recorded, to pass an order of discharge during

pendency of trial of an accused at any stage of the case.

19. After going through the allegations made in the complaint and evidence collected during inquiry under Sections 200 and 202, Cr.P.C., the

accused persons failed to establish that the necessary ingredients of offenses for which they have been summoned, are not available and the trial

would be an abuse of process of law or the prosecution has been lulched after suppression of some material facts which were necessary to be

brought before the court by the prosecution and in case those suppressed fact are taken into consideration no offence would construe against the

accused persons. It is not a case where there is any legal impediment, like want or prior sanction to prosecute or bar of limitation etc.

20. Thus, in the case in hand, the learned Magistrate rightly dismissed the application u/s 245(2), Cr.P.C., and simultaneously order for issuing

non-bailable warrant against the accused persons/petitioners to secure their attendance.

21. On the basis of the aforesaid discussion made above and in view of the fact and circumstances of mis case the petition deserved to be

dismissed. With the aforesaid observations, the petition lacks merit and is dismissed at admission stage.