
Kedar Nath Jain Vs State of M.P.

Civil Revision No. 513 of 1973

Court: Madhya Pradesh High Court (Gwalior Bench)

Date of Decision: July 19, 1977

Acts Referred:

Penal Code, 1860 (IPC) " Section 193, 467, 471

Citation: (1977) J LJ 660

Hon'ble Judges: Shiv Dayal Shrivastava, C.J

Bench: Single Bench

Advocate: N.K. Jain, for the Appellant;

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Shiv Dayal, C.J.

Facts material for this revision are that M/s. Lakhuram Chironjilal applied for execution of a decree against Ramcharan

(Execution Case No. 90 of 1968). Four houses were attached in village Gaswani Kedarnath filed an objection petition under Order 21, Rule 58,

CPC (Misc. Civil Case No. 22 of 1968). An enquiry was made. By order dated October 13, 1969, the learned Civil Judge, sabalgarh, dismissed

the objection petition. While dismissing the objection petition, he recorded a finding that the sale deeds produced by the objector were fabricated

and that false evidence had been given in the Court. He also found that to eradicate the evil of perjury and in the interest of justice it was necessary

that Kedarnath be prosecuted under Sections 193, 467 and 471 of the Penal Code. Having recorded that finding, the trial Court directed that a

complaint be made against Kedarnath and others. In his order, the trial Judge further said:

I do not consider it necessary to give an opportunity to these persons of being heard before filing a complaint."" (When rendered into English)

Aggrieved by that order, Kedarnath preferred an appeal. The learned Additional District Judge, Morena, dismissed it. Aggrieved by an order of

the appellate Court, Kedarnath has filed this revision.

2. Learned counsel for the petitioner strenuously argued that the requirement u/s 479-A of the Code of Criminal Procedure, 1898, which applies

to this case (as the order of the trial Court was passed on December 15, 1967), for giving an opportunity of being heard is mandatory, and in this

case no opportunity was given. The learned Civil Judge further studiously observed that no opportunity would be given to Kedarnath.

3. Learned counsel's argument is that the very language of Section 479-A of Code of Criminal Procedure, supports his contention. It is urged that

discretion has been vested in the Court by the words ""if it so thinks fit"", which relate to the making of a complaint, not to giving a witness an

opportunity of being heard. To put it differently, it is in the discretion of the Court whether to make a complaint against a witness or not. But once

the Court decides to exercise the discretion for making a complaint, it cannot do so without giving the witness an opportunity of being heard

because of the emphatic expression ""after giving a witness an opportunity of being heard"". Learned Counsel has placed before me several

decisions which undoubtedly support his contention. They are: Rattan Chand v. P.C. Bhatia 1961 Cri. L J 557; a decision of Mr. Justice A.N.

Grover (as his Lordship then was); In re Virudan 1963 (1) C R 370 (2) and Abdul Shakoor v. State of Rajasthan A I R 1965 Raj. 195. The ratio

decidendi of these cases is that the expression ""may, if it so thinks"" governs the clause ""make a complaint there of in writing"". However, if the Court

decides to make a complaint it can do so only after giving the witness an opportunity of being heard. In view of what I am going to say presently, it

is not necessary to dilate further on the point and elaborately discuss the reasoning contained in those decisions. But there is no doubt that these

decisions support the petitioner's contention.

4. In Abdul Shakoor v. State of Rajasthan (supra), a decision of Andhra Pradesh High Court was cited. That case is In Re: Javvaji Uthanna,

Another case Ruhmani Bai v. Govindaswamy Chetty 1963 (2) Cr. L J 355 a decision of Madras High Court was also cited. In the Andhra

Pradesh case, the Madras case was relied on (see paragraph 6). The learned Judge of the Rajasthan High Court disagreed with the view taken by

the Madras and Andhra Pradesh High Courts in the above cited case.

5. In the Madras case Rukminibai v. Govindaswamy; there are inter alia certain observations in paragraph 6, which point towards the distinction

between a party and a witness who is not a party: --

Should the person against whom the complaint is directed to be laid,--whether he is a party to the proceeding or is a mere witness, be served with

"show cause notice" as to why he should not be prosecuted for the particular offence with which he is charged and be given an opportunity to

show that there are no grounds for the matter being taken to the criminal Court, and does Section 479-A make it incumbent upon the Court to

issue such notice or to afford such opportunity is the real question that arises in this case. The words used in Section 479-A are: "The Court....."

may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof in writing". A party who gives evidence also

becomes a witness. of course, there may be a witness who is not a party to the suit. While the party is very often represented by counsel, a witness

has no locus standi to engage counsel and participate in the trial of the action. I must confess that the language of the provision is somewhat

perplexing. It is not quite clear whether the words "after giving the witness an opportunity of being heard" have been inserted to operate as a pre-

requisite or a condition for the exercise of jurisdiction to file the complaint. It is possible to argue that the question of issuing notice or not is purely

a matter of discretion of the Court..... "".

However, the concluding paragraph contains the final opinion of the learned Judge of the Madras High Court:--

In my opinion on a strict construction of Section 479-A (1) notice to the person affected, namely, the witness charged with having given false

evidence of fabricated false document is not necessary. But all the same notice should be issued as there is no reason why the well known and well

accepted principle of "audi alteram partem" should not apply. That "No man shall be condemned behind his back" is a rule of natural justice which

has been repeatedly laid down in the matter of observance of judicial procedure both in established Courts of the land and even in tribunals. The

English rules of natural justice resemble the concept of procedural due process in the United States. In spite of the trenchant observation of Lord

Shaw in Local Government Board v. Arlidge 1915 A C 120 at p.138, that the rule is a high sounding expression though harmless, that insofar as it

attempts to reflect the old "jus naturale", it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions,

and that it is vacuous in so far as it is resorted to for other purposes, it has stood the test of time and has survived the occasional judicial gibes in

regard to its contents and scope. The duty to act judicially would be wholly illusory if the authority discharging the duty can at his will and pleasure

dispense with notice to the person affected and proceed ex-parte. However debatable may be the question whether the non-observance of the

rule would vitiate the proceedings of bodies whose functions are not strictly judicial, Courts and judicial tribunals must adhere to it as they cannot

shed themselves of their essential features. It seems to me that it would be a traversery of law and justice if a Court can render decisions against

persons without notice to them on the ground that there is no provision of law requiring such notice to be given. Prosecuting a person for an

offence under the Indian Penal Code is certainly a grave matter and however much it may be called for in the interests of public administration of

justice the persons who is to face the prosecution should in all fairness be given an opportunity to vindicate himself if he can even prior to the

commencement of the prosecution in cases governed by Section 476 and Section 479-A, Code of Criminal Procedure. The very object of the

provisions of Section 195, Code of Criminal Procedure making certain offences not cognizable without the Court itself filing the complaint and the

scheme of the provisions of Sections 476 and 479-A, Code of Criminal Procedure show that in offences affecting the administration of justice

prosecution should not be launched as a matter of routine or in a mechanical manner. It is true that in the present case there is "prima facie"

evidence to show that the defendant and her witness D.W. 1, have sought to support the defence by giving false evidence and by fabricating false

documents: and if the complaint had been laid after due notice to the persons accused and after hearing them, I would have been very reluctant to

quash it. It is common ground that no notice was issued to the defendant and D.W. to show cause why the complaint should not be laid. In my

opinion, the filing of the complaint in these circumstances before the Magistrate is illegal and improper.

These observations clearly lay down as follows:

(1) The provision of giving an opportunity u/s 479-A, Code of Criminal Procedure is not mandatory.

(2) However, applying the principle of natural justice, such an opportunity must be given.

6. In the result, the learned Judge of the Madras High Court directed withdrawal of the complaint.

7. Now, all this discussion becomes academic because the point has been settled by their Lordships of the Supreme Court in Narayan Swami v.

State of Maharashtra 1961 (1) Cr. L J 557. In that ruling, their Lordships, after quoting the conclusions in paragraph 5, laid down thus in

paragraph 6:--

This section was introduced into the Code with the idea of eradicating to the extent possible the evils of perjury and fabrication of false evidence, a

widespread evil that is corroding our judicial system. The then existing procedure in the matter of prosecuting those who give false evidence or use

fabricated evidence in judicial proceedings was found to be tardy and ineffective. Therefore power was given both to the trial Court as well as to

the appellate Court to forthwith complain against witnesses guilty of perjury or fabricating false evidence without having recourse to the procedure

laid down in Sections 476 to 479 of the Code of Criminal Procedure. But at the same time the Legislature felt that before proceeding against those

persons, the Court must form an opinion that the witness has either given intentionally false evidence and further must form an opinion that it is

expedient in the interests of justice that the witness should be prosecuted for the offence committed by him."".

Their Lordships then again reproduced in paragraph 7 of their decision the relevant portion of clause (1) of Section 479-A and emphasised the

words ""if it so thinks fit, after giving the witness an opportunity of being heard make a complaint thereof in writing.... "" Then in paragraph 1 their

Lordships compared the language of Sub-section (5) of Section 479-A with that of Sub-section (1) and emphasised the words ""but no such order

shall be made without giving the person affected thereby an opportunity of being heard."" Their Lordships then laid down the law thus:--

In other words, in the case of the trial Court a discretion is given as to whether an opportunity should be given or not before filing a complaint to

show cause against the proposed complaint but so far as the appellate Court is concerned the giving of an opportunity to the witness to show

cause against the contemplated complaint is made mandatory. The reasons for this discretion is understandable. So far as the trial Court is

concerned it is the Court that has seen the witness and observed his demeanour. Therefore, the Legislature evidently thought that the question

whether a witness should be given a further opportunity to show cause why complaint should not be filed against him may be left to the discretion

of that Court but the appellate Court having no such opportunity, the Legislature evidently thought that an opportunity should be given to the

witness to show cause against the contemplated complaint. The conclusion arrived at by us accords with the view taken by the High Court of

Madras in *Rukmani Bai v. G.R. Govindaswamy Cheitv.* and by Andhra Pradesh High Court in *Re Jayyaji Uthanna*.

(I have taken the liberty of breaking in 3 paragraphs the above passage reproduced from paragraph 8 of the decision).

8. Having regard to their Lordships above dictum, the matter must be held to be concluded. It is the discretion of the trial Court whether to give an

opportunity to the witness who is to be prosecuted under Sub-section (1) of section 479-A or not. Their Lordships' decision in *B.K. Pal*

Chaudhry Vs. The State of Assam, was in regard to an order passed by the appellate Court u/s 479-A, Code of Criminal Procedure but not by

the trial Court.

9. The revision is, therefore, dismissed. There will be no order or costs. The record shall be returned to the trial Court within 3 days from today.