(1990) 06 PAT CK 0004

Patna High Court

Case No: Criminal Miscellaneous No. 3630 of 1988

Mahesh Chander Singh		APPELLANT
	Vs	
Raghunandan Prasad and Another		RESPONDENT

Date of Decision: June 27, 1990

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 144, 192, 192, 192(1), 192(2)
- Penal Code, 1860 (IPC) - Section 220, 342, 347, 406, 417

Citation: (1991) 39 BLJR 281 : (1991) CriLJ 72 : (1990) 2 PLJR 298

Hon'ble Judges: Bhuvasneshwar Prasad, J

Bench: Single Bench

Advocate: Anusuya Jayaswal, app, Nagendra Rai, Pushkar Narain Shahi, Sandeep Kumar and Rajesh Kumar, for the Appellant; Kalika Nandan and Kumar Laliteshwar Prasad Singh, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Bhuvasneshwar Prasad, J.
This application u/s 482 of the Code of Criminal Procedure, 1973 (In short ''the Code'') has been filed for quashing the prosecution of the petitioner for the offences under Sections 406 and 504 of the IPC in Complaint Case No. 42-C of 1988 including the order dated 30-3-1988 passed by Shri A. K. Verma, Judicial Magistrate IInd Class, Nalanda at Biharsharif ordering for issuance of processes against the petitioner on the ground that a prima facie case under the aforesaid sections has been made out against him.

2. It appears that opposite party Raghunandan Prasad had filed a complaint petition (Complaint Case No. 42-C of 1988) against the present petitioner before the Chief Judicial Magistrate, Nalanda at Biharsharif. In this complaint petition he had made allegations against the petitioner with respect to the offences under Sections 406

and 504 of the Indian Penal Code. According to the opposite party he had handed over a sum of Rs. 300/-to the petitioner on 4-2-1988 towards the land revenue but the petitioner did not grant him any rent receipt. On the other hand, the petitioner asked him to come on the following day for obtaining the receipt. On this the opposite party had asked him to return back the money. The petitioner refused to do so, was infuriated, abused him and forcibly turned him out from the Chosrawan Kutchery. Thereby the opposite party alleged that the petitioner committed criminal breach of trust with respect to Rs. 300/ - handed over to him and also the offence u/s 504 of the Indian Penal Code by intentionally insulting him with intent to provoke breach of peace by turning him out from the Kutchery. The learned Chief Judicial Magistrate examined the opposite party on solemn affirmation and by his order dated 5-2-1988 made over the case for inquiry or trial u/s 192 of the Code to the court of Shri A. K. Verma, Judicial Magistrate, IInd Class. This order is particular as also the entire criminal prosecution against the petitioner are under challenge.

3. Before Shri A. K. Verma, Judicial Magistrate, IInd Class two witnesses were examined and finding a prima facie case made out against the petitioner he ordered for the issuance of processes against him by his order dated 30-3-1988. This order of the learned Magistrate has also been challenged as incompetent.

4. It has further been pointed out on behalf of the petitioner that no case under Sections 406 and 504 of the Indian Penal Code has been made out against him. The opposite party was annoyed against him over the construction of a road on plot No. 339 in the village. The report submitted by the petitioner had infuriated and annoyed the opposite party for which he had filed a petition before the Collector, Nalanda. The records of the Anchal will show that the rent only a sum of Rupees 194.38 paise was due from the opposite party up to 31-3-1988. As such there was no occasion for the opposite party to hand over a sum of Rs. 300/- to the petitioner towards the payment of this rent. The allegations made in the complaint petition do not make out a case of criminal breach of trust. The allegations that when the opposite party had insisted for the issuance of a receipt the petitioner got him forcibly removed from the office and also abused him appear to be highly improbable. The petitioner is a karamchari and therefore a public servant. The allegation against him is that while discharging his official duties as a karamchari he had received a sum of Rs. 300/- from the opposite party. As such while receiving this amount he was acting or purporting to act as a public servant in discharge of his official duties and therefore he cannot be prosecuted without proper sanction of the Government as required u/s 197 of the Code. The offence u/s 406 of the Indian Penal Code is triable by a Magistrate of 1st Class and therefore the case could not have been handed over to Shri A.K. Verma, Judicial Magistrate IInd Class u/s 192 of the Code. Consequently all orders passed by him in the said case are without jurisdiction. The prosecution of the petitioner is an abuse of the process of the court. On these grounds, it was contended that the prosecution of the petitioner under Sections 406 and 504 of the Indian Penal Code including the impugned order dated

30-3-1988 by which the learned Judicial Magistrate had ordered for the issuance of processes against the petitioner be quashed.

5. I have heard both the parties at length. On behalf of the petitioner an objection has been taken against his prosecution on the ground that being a public servant he was discharging his official duties by receiving the rent from the opposite party as alleged against him. Thus the aid of Section 197 of the Code has been sought by the petitioner. According to him, therefore, he cannot be prosecuted without the necessary sanction from the State" Government. This contention of the petitioner has been challenged by the opposite party. Before proceeding further, I would like to briefly refer to Section 197 of the Code which provides that when a public servant not removable from his office save by or with the sanction of the State Government is accused of any offence alleged to have been committed by him while acting or purporting to act in. discharge of his official duties, no court shall take cognizance of such offence except with the previous sanction of the State Government. The petitioner has claimed the protection of Section 197 of the Code. This has been challenged by the opposite party. The question is whether the protection of Section 197 can be extended to the petitioner or not. Admittedly, the petitioner is a karamchari. No doubt he is a public servant but he is not one of those who cannot be removed from his office save by or with the sanction of the Government. This position has not been disputed by either party. As such the petitioner cannot seek the aid of Section 197 of the Code. Moreover, the opposite party has contended that committing the offence of criminal breach of trust is no part of the official duties of the petitioner. By committing this offence he cannot be said to be acting or purporting to act in discharge of his official duties and therefore he cannot seek the aid of Section 197 of the Code. Obviously committing an offence of criminal breach of trust cannot be said to be in discharge or purported discharge of the official duties by any public servant. Hence, I find force in this contention of the opposite party. Moreover, since the petitioner happens to be a karamchari, he is not one of those public servants who cannot be removed from his office save by or with the sanction of the State Government. Therefore, on this ground also the petitioner cannot seek the protection of Section 197 of the Code.

6. In this connection a reference may be made to the case of Balram Bhagat v. State of Bihar 1989 Pat LJR (HC) 312. In this case a police officer below the rank of Assistant Superintendent was sought to be prosecuted without obtaining necessary sanction from the State Government. It was held by me in this judgment that such a Police Officer could be prosecuted without obtaining the sanction from the State Government even if it be shown that he was acting or purporting to act in discharge of his official duties. In this decision reliance has been placed on the case of Nagraj Vs. State of Mysore, and also on the case of Narmadeshwar Sharma and Another Vs. Sarju Chandra Poddar, . In the case of Nagraj a Sub-Inspector of Police was sought to be prosecuted without the sanction of the State Government. It was held that since the Inspector General of Police can dismiss a Sub-Inspector, no sanction was

necessary. In the case of N. Sharma relying one the above mentioned decision of the Supreme Court it was held that since a Sub-Inspector or Assistant Sub-Inspector is removable by the Inspector General of Police and not by the State Government, no sanction from the State Government to prosecute any of them would be necessary. In this background and in view of these decisions it is well settled that the petitioner who happens to be a karamchari and is not a public servant not removable from his office save by or with the sanction of the State Government he cannot seek the aid of Section 197 of the Code even if it be presumed for a moment that he was acting in discharge or purported discharge of his official duties. Hence, I do not find any force in this contention of learned counsel for the petitioner.

7. On behalf of the petitioner it has been submitted that the offence u/s 406 of the Indian Penal Code is triable by a Magistrate of the 1st Class. However, by the impugned order dated 30-3-1988 the learned Chief Judicial Magistrate has transferred the case u/s 192 of the Code for enquiry or trial to a Magistrate of the IInd Class. According to the learned counsel for the petitioner this could not have been done since a Magistrate of the IInd Class could not have tried an offence u/s 406 of the Code. Therefore, it was his submission that this order dated 30-3-1988 is liable to be quashed. It was also his submission that since in the course of the enquiry the learned IInd Class Magistrate had examined two witnesses this was also without jurisdiction and he could not have passed any order for issuing the summons to the petitioner for standing his trial under Sections 406 and 504 of the Indian Penal Code. This contention of the petitioner has been seriously challenged by the learned counsel for the opposite party. Since, however, this question is of a considerable importance, I propose to examine it in detail. Before doing so, however, I would like to quote Section 192 of the Code of Criminal Procedure, 1898 (in short "the old Code"). Prior to its amendment by Amending Act XXVI of 1955 it ran as follows :--

192(1) "Any Chief Presidency Magistrate, District Magistrate or Sub-divisional Magistrate may transfer any case of which he has taken cognizance for enquiry or trial to any Magistrate subordinate to him.

(2) Any District Magistrate may empower any Magistrate of the 1st Class who has taken cognizance of any case to transfer it for enquiry or trial to any other specified Magistrate in his District who is competent under this Code to try the accused or to commit him for trial, and such Magistrate may dispose of the case accordingly."

8. This section has undergone significant changes in the new Code. The present Section 192 runs as follows:--

192 Making over cases to Magistrate --

(1)"Any Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for enquiry or trial to any competent Magistrate subordinate to him."

(2) "Any Magistrate of the 1st Class empowered in this behalf by the Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for enquiry or trial to such other competent Magistrate as the Chief Judicial Magistrate may by general or special order specify and thereupon such Magistrate may hold enquiry or trial."

9. From the new Section 192 it would appear that there has been some significant departure from the earlier Section 192 of the old Code as it stood before the Amending Act, 1955. In the first place in Section 192(1) of the old Code power has been given to the Chief Presidency Magistrate etc. to transfer any "case" of which he has taken cognizance to any Magistrate subordinate to him for enquiry or trial. So far as Section 192(2) of the Old Code is concerned any Magistrate of the 1st Class empowered by the District Magistrate could transfer a case for any enquiry or trial to any other specified Magistrate who is competent under the Code to try the accused or to commit him for trial. Thus a comparison of Section 192(1) of the old Code with the parallel provisions of Section 192(1) of the present Code will go to show that in the new Code in the place of "Case" the word "offence" has been used. While in the old section the Chief Presidency Magistrate, the District Magistrate or the Sub-divisional Magistrate, were authorised to transfer any case u/s 192(1) of the present Code it is only the Chief Judicial Magistrate who could make over the case for enquiry or trial to any competent Magistrate subordinate to him. This he could do only after he has taken cognizance of the offence. Thus this change in the language clearly shows two things namely that while under the old Sub-section (1) any case could be transferred to a Magistrate subordinate to the three types of the Magistrates mentioned in the sub-section under the new Sub-section (1) of Section 192, it is only the Chief Judicial Magistrate who could make over the case for enquiry or trial to any competent Magistrate subordinate to him after taking cognizance of an offence. This will necessarily imply that under the new provisions it is only in the case of substantive offence that the Chief Judicial Magistrate could make over the case for enquiry or trial to any competent Magistrate whereas under the old provisions it was not only in the cases of substantive offences but also in the cases of other nature like a proceeding u/s 144 of the Code which could be transferred for enquiry or trial to a Magistrate subordinate to them. From this it would appear that there has been significant changes in this section in the old Code and the present Code.

10. The question that will now arise for consideration would be what is the meaning of expression "competent Magistrate" used in both the Sub-sections of Section 192 of the new Code? Obviously a competent Magistrate will mean a Magistrate who is competent to hold the enquiry or trial in the cases made over to him by the Chief Judicial Magistrate after taking cognizance of the offence. If, however, the offence is one which is triable by a Magistrate of the 1st Class could the case be made over to a IInd Class Magistrate for enquiry or trial by the Chief Judicial Magistrate in exercise of the powers u/s 192(1) of the Code. To my mind it is clear that this could not be

done and in such a situation a Magistrate of the IInd Class will not get jurisdiction to enquire into or to try an offence which is triable exclusively by a Magistrate of 1st Class even if such a case is made over to him by the Chief Judicial Magistrate. In other words, in such a situation a Magistrate of the IInd Class does not get jurisdiction for enquiry or trial of those cases which are exclusively triable by a Magistrate of 1st Class inasmuch as he cannot be said to be a competent Magistrate within the meaning of Section 192 of the Code since he has not been authorised under law to try an offence which is exclusively triable by the Magistrate of 1st Class. In this view of the matter, it would become clear that the order dated 5-2-1988 by which the learned Chief Judicial Magistrate after examining the opposite party on solemn affirmation on the basis of a complaint petition filed for an offence u/s 406 I.P.C. also made over the case for enquiry or trial to a Magistrate of the IInd Class cannot be said to be a valid order. That being the position the order dated 30-3-1988 passed by the Magistrate IInd Class finding out a prima facie case under Sections 406 and 504 of the Indian Penal Code on the basis of the evidence of two witnesses examined before him and issuing of summons against the present petitioner cannot be said to be valid in the eye of law.

11. In support of his contention learned counsel for the petitioner has placed reliance on the case of Khuda Baksh v. Emperor AIR 1933 Lah 1009 : (1934 Cri LJ 514). In this case the trial Magistrate trying the case found that the offences alleged before him were under Sections 420 and 417 of the Indian Penal Code, The Magistrate was having only IInd Class power whereas the offence u/s 420 of the Indian Penal Code was triable by a Magistrate of the 1st Class. It was held by Tek Chand, J. in the said case that this is a matter which goes to the very root of the case. According to him it was not an irregularity which could be cured u/s 537 of the old Code (Section 465 of the new Code). Learned counsel appearing on behalf of the opposite party has in this connection drawn my attention to Section 460(f) of the new Code which relates to making over a case under Sub-section (2) of Section 192. On this basis he has tried to show that this is a curable irregularity. However, I do not find any substance in this contention because Section 460(f) simply relates to those cases which are made over u/s 192(2) of the Code by a Magistrate not empowered to do so. This however will not mean that if a case is made over u/s 192(1) of the Code to a Magistrate who is not competent to try it this irregularity will not vitiate the proceeding. Obviously it will go to the very root of the case as observed in the above mentioned case of Khuda Baksh and it cannot be cured u/s 537 of the old Code corresponding to Section 465 of the new Code.

12. Learned counsel for petitioner has also placed reliance on the case of AIR 1940 244 (Oudh) . In this case the complaint petition was filed u/s 427 of the Indian Penal Code alleging that the damage was to the extent of Rs. 60/-. This allegation in the complaint petition was supported by the statement on solemn affirmation of the complainant. The Sub-Divisional Magistrate transferred the case to a Tehsildar who happened to be a Magistrate of IIIrd Class. During the trial the amount of damage

was reduced to Rs. 40/- only. However, it was held by the court that such a transfer of the case to a Magistrate of the IIIrd Class was illegal even if during the trial the amount of damage was reduced from Rs. 60/- to Rs. 40/-. It was further held that the case will not be covered u/s 537 of the old Code. This decision is relevant, in the present case also since on behalf of the opposite party it has seriously been contended that no offence u/s 406 of the Indian Penal Code has been made out against the petitioner and therefore the order of the learned Chief Judicial Magistrate making over the case to a Judicial Magistrate of the IInd Class was perfectly legal. In this connection it may be stated that an offence u/s 406 of the Indian Penal Code is made out when any person being in any manner entrusted with the property dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged he commits the offence of criminal breach of trust which is made punishable u/s 406 of the Indian Penal Code. In the present case the prima facie allegation against the petitioner is that a sum of Rs. 300/- was handed over to him by the opposite party towards the payment of land revenue." The petitioner, however, did not issue any receipt even on demand. When the opposite party asked the petitioner to refund this money to him he was thrown out of the katchery. From this it would appear prima facie that the petitioner dishonestly disposed of that property in violation of any direction of law prescribing the mode in which such trust was to be discharged. As is well known whenever the land revenue is handed over to a karamchari he is obliged under the rules and the law to grant a receipt for the same to the person who tenders the money to him. In the present case as per the allegations made in the complaint petition, the petitioner refused to grant any receipt to the opposite party or to pay the money back to him even on demand. Thus prima facie an offence of criminal breach of trust appears to have been made out. Another criticism against this allegation is that there was no occasion for the opposite party to tender a sum of Rs. 300/- to the petitioner since only a sum of Rs. 194.38 paise was due from him up to-date towards the land revenue. At the present stage I would not like to express any opinion about it and these questions could properly be gone into at the stage of trial. This will, however, not go to show that prima facie no allegation for an offence u/s 406 of the Indian Penal Code was made out by the opposite party in the complaint petition. As stated above in the above mentioned case of Mathra (1940 Cri LJ 469) (Oudh) (supra) though the extent of damage was reduced to Rs. 40/- it was held that the transfer of the case by Sub-divisional Magistrate to the Tehsildar who was a Magistrate of IIIrd Class was illegal. Hence, I do not find any force in this contention of learned counsel for the opposite party that since no offence u/s 406 of the Indian Penal Code was made out against the petitioner the order making over the case to a Judicial Magistrate IInd Class was perfectly legal.

13. Learned counsel for the petitioner has also placed reliance on the case of Mansharam Gyan Chandra v. Emperor AIR 1941 Sind 36 : (1941 Cri LJ 460). This was a case in which the allegation was made for an offence u/s 220 of the Indian Penal

Code which was triable exclusively by the Court of Session. The Magistrate before whom the case was pending held that the allegation disclosed only the offences under Sections 342 and 347 of the Indian Penal Code. Thus he reduced the offences and conferred the jurisdiction on himself. It was held that the trial of such an offence by the Magistrate was not merely an irregularity which was curable u/s 537 of the old Code but it was an illegality even when the objection with respect to the jurisdiction of the Magistrate was taken at a late stage. Thus this decision also supports the contention of the petitioner.

14. Also the petitioner has placed reliance on the case of Ranada Kishore Roy Vs. Swarnamoyee Debi Roy, . This was the judgment by Edgley, J. It was held in this case that it was of course obvious that the Magistrate to whom the case was transferred u/s 192 of the Code must be empowered to try it otherwise the trial would be void under the provisions of Section 530 of the Code. It was further held that when a case is transferred u/s 192(1) of the Code to a Subordinate Magistrate he gets the same power and authority to deal with the case as regards issuing of processes etc. as is vested in the superior Magistrate. In this case the complaint petition was filed against several persons but the Magistrate issued summons only against one of them and transferred the case to a Subordinate Magistrate. The person so summoned died. It was held that the transferee Magistrate could proceed even against the rest since what was transferred to him was the case itself.

15. Learned counsel for the petitioner has also placed reliance on the case of Bhubaneswar Prasad Singh and Others Vs. Chairman, Garulia Municipality, . In this case the Sub-divisional Magistrate had received an application for an action u/s 144 of the Code. He applied his mind to it for deciding whether or not action could be taken. It was held by a Division Bench of Calcutta High Court that the moment he has applied his mind to the case he took cognizance of the same for enquiry and can transfer it u/s 192 of the Code to a Magistrate subordinate to him but competent to take action u/s 144 of the Code. At the outset I had pointed out that u/s 192 of the old Code the word ''Case'' has been used and u/s 192 of the new Code the word ''offence'' has been used. Accordingly the operation of Section 192 of the old Code was even extended to a proceeding u/s 144 of the Code. Even in a situation like this it was held in this case that the. superior Magistrate could transfer the case u/s 144 of the Code to a subordinate Magistrate who was competent to take action under this provision of law. It will mean that the transferee Magistrate has to be one of the Magistrates authorised to take action u/s 144 of the Code as otherwise the transfer would be illegal.

16. On behalf of the opposite party, it has, however, been contended that for the purposes of enquiry or trial the case could have been made over even to a Magistrate of IInd Class and if he found that the case was exclusively triable by a Magistrate of the 1st Class he could have taken action u/s 322 of the Code. On this ground the opposite party has contended that at this stage when the trial has not

started the impugned order dated 5-2-1988 making over the case for enquiry or trial u/s 192 of the Code or the order dated 30-3-1988 for the issuance of the processes against the petitioner should not be struck down. It was his submission that Section 322 of the Code gave ample power to the Magistrate holding an enquiry or trial to stay the proceeding and to submit the case with a brief report to the Chief Judicial Magistrate in case he finds that he has got no jurisdiction to try the case or to commit it for trial. This contention of learned counsel is devoid of any substance. Section 322 of the Code envisages a situation when in the course of enquiry or trial if the evidence appears to warrant a presumption that the Magistrate has got no jurisdiction to try the case or to commit it for trial then only he is required to stay the proceeding and to submit the report as aforesaid. In the present case this situation has not come inasmuch as the trial has not commenced. On the other hand from the allegation made in the complaint petition as well as the statement of the opposite party on solemn affirmation it would appear that the allegation made against the petitioner was also for an offence u/s 406 of the Indian Penal Code. As a matter of fact, from the order dated 30-3-1988 also it would appear that the learned Magistrate IInd Class found a prima facie case made out under Sections 406 and 504 of the Indian Penal Code and accordingly he ordered for the issuance of summons to the petitioner. In this situation when the allegation made in the complaint petition as well as on the basis of the statement made on solemn affirmation it would appear that a case also u/s 406 of the Indian Penal Code was made out against the petitioner, there was no point in making over such a case for enquiry or trial to a Magistrate of the IInd Class. Therefore, truly speaking Section 322 of the Code will not be applicable to the facts and circumstances of the present case. It will hardly make any difference whether the trial has or has not been started so far as the legality or the legality of the order passed u/s 192 of the Code is concerned.

17. On behalf of the opposite party it has been contended that in any view of the matter the order taking cognizance of the offence cannot be said to be bad. It is only the order making over the case u/s 192 of the Code which, if at all, can be said to be bad. Therefore, it was his submission that only that part of the order dated 5-2-1988 could be quashed by which the case was made over for enquiry or trial to a Magistrate of IInd Class. Learned counsel for the opposite party has taken pains to explain that so far as the order taking cognizance of the offence was concerned it was passed by the learned Chief Judicial Magistrate and therefore it cannot be said to be bad or without jurisdiction. I find force in this contention of learned counsel for the opposite party.

18. Lastly it has been contended on behalf of the opposite party that since the impugned orders are only interlocutory in nature, no revision application against them would lie. The present application has, however, been filed u/s 482 of the Code and not under Sections 397 and 401 of the Code. No doubt as held in the case of Madhu Limaye Vs. The State of Maharashtra, , the label of the petition is immaterial and on a petition filed under Sections 397 and 401 of the Code the jurisdiction of

this court u/s 482 can also be invoked. Further it has been held in this case that a plain reading of Section 482 will show that nothing in the Code which would include Section 397(2) also shall be deemed to limit or to affect the inherent powers of the High Court. It was further held that the bar of Section 397(2) operates only in exercise of the revisional powers by the High Court. Then, since there is no other provision in the Code for the redressal of the grievances of the aggrieved party the inherent power would come into play. In the case of Raj Kapoor and Others Vs. State and Others, , it has been held that the inherent power of the High Court does, not stand repelled when the revisional power u/s 397 overlapses. Nothing in the Code not even Section 397 of the Code can affect amplitude of the inherent power preserved in so many terms by the language of Section 482. In the case of Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, , it has been held that Section 482 has a different parameter and is a provision independent of Section 397(2). While Section 397 of the Code applies to the revisional powers of the High Court. Section 482 regulates the inherent powers of the Court to prevent the abuse of the process of the court. These decisions clearly indicate that even when the order is hit by Section 397(2) of the Code the inherent power of the High Court u/s 482 of the Code could be exercised and to this extent the decision in the case of Amar Nath and Others Vs. State of Haryana and Another, , stood modified.

19. Learned counsel for the petitioner has further pointed out that he has challenged the whole proceeding against him including the impugned orders. According to him the order dated 5-2-1988 and also dated 30-3-1988 could not be said to be interlocutory in nature and therefore the bar of Section 397(2) of the Code will not apply. He has relied in this connection on the case of Madhu Limaye Vs. The State of Maharashtra, to state that the test that if an order is not final it must be interlocutory is not correct. Also he has relied on the observation made in the case of Raj Kapoor and Others Vs. State and Others, that in between the final order and interlocutory order there is a "tertium quid" namely when the order is more than purely interlocutory and less than final order. In such a situation as held in this case inherent power could be exercised. He has also heavily relied on the case of Amar Nath and Others Vs. State of Haryana and Another, to state that when the orders are matters of moment which affect or adjudicate rights of the party they cannot be said to be interlocutory so as to be barred u/s 397(2) of the Code. It was further observed in this decision that an order which substantially affects or decides certain rights of the party cannot be said to be interlocutory order so as to constitute the bar u/s 397(2) of the Code. Here it has been pointed out by the learned counsel for the petitioner that the impugned order dated 5-2-1988 is illegal and by this order no jurisdiction to hold enquiry or trial could be conferred on Shri A. K. Verma, a IInd Class Magistrate hence in effect it cannot be said to be an interlocutory order. It has been pointed out that the subsequent proceeding in the case including the order dated 30-3-1988 passed by the learned Magistrate were orders without jurisdiction and therefore the bar of Section 397 of the Code would not apply. Under the facts

and circumstances of this case, I feel inclined to agree with the submission of learned counsel for the petitioner.

20. For the reasons stated above, the order dated 5-2-1988 according to which the learned Chief Judicial Magistrate made over the case u/s 192 of the Code for enquiry or trial to a Judicial Magistrate of the IInd Class is quashed. As a result of this all subsequent orders passed by the learned Judicial Magistrate IInd Class are also quashed. It, however, appears that as per Section 192 of the Code, an order making over the case to another Magistrate could only be passed after the cognizance of the offence was taken by the Chief Judicial Magistrate. In the instant case also since the order was passed u/s 192 of the Code it can safely be presumed that before making over the case to Shri A. K. Verma, Judicial Magistrate IInd Class the learned Chief Judicial Magistrate had already taken cognizance of the offence. This he was authorised to do and this part of the order of the learned Chief Judicial Magistrate does not warrant any interference. The subsequent portion of the order dated 5-2-1988 making over the case to the Judicial Magistrate IInd Class for enquiry or trial u/s 192 of the Code being not legal is quashed. The learned Chief Judicial Magistrate is accordingly directed either to try the case himself or to pass necessary order u/s 192 of the Code making over the case for enquiry and trial to another competent Magistrate.

21. In the result, this application is allowed in part in the light of observations made above.