(2001) 07 CAL CK 0007

Calcutta High Court

Case No: Criminal R. No. 2248 of 2000 and Cr. R. No. 2249 of 2000

Dipak Ghosh Dastidar		APPELLANT
	Vs	
Sanat Kumar Mukherjee and State		RESPONDENT

Date of Decision: July 3, 2001

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 190, 200, 201, 465, 465(1)
- Penal Code, 1860 (IPC) - Section 120B, 34, 403, 404, 409
- Prevention of Corruption Act, 1988 - Section 19, 5(2)

Hon'ble Judges: Amit Talukdar, J

Bench: Single Bench

Advocate: Sekhar Basu, Mr. Himanghsu De, Mr. Ashoka Bera and Ms. Dipali Sinha, for the Appellant; Subhendu Sekhar Roy and Mr. Samir Chatterjee, for the Respondent

Final Decision: Dismissed

Judgement

Amit Talukdar, J.

What has been sought to be described as an oasis is nothing else but a teasing mirage; otherwise subtle point has been dangled before this Court, which, however, appealing at the first blush appears to be suffering from basic hollowness.

2. With this signature tune, let me cast the symphony of the legal proposition sought to have been harped on behalf of the petitioners before this Court. The basic task for this Court in this revisional application is whether a cognizance taken by the learned Magistrate on the basis of a Petition of Complaint without examining the complainant can be sustained in the event he is not a public servant.

3. Let me now proceed to find out as to whether the edifice of the argument of the learned Counsel of the petitioner is based on a solid grounds or simply on quick sand.

Since the confection of both the revisional applications are analogous this common judgment would govern the fate of the same.

4. A Petition of Complaint was lodged by the opposite party No. 1 in the Court of the learned Judge, 1st Special Court, Purulia. It was registered as Special Case No.5 of 2000. In the said Petition of Complaint the opposite party No. 1 alleging commission of the offence punishable under Sections 403/404/409/420/120B/34 of the Indian Penal Code and Section 5(2) of the Prevention of Corruption Act (herein after referred to as the said Act) prayed for issuing Warrant of Arrest against the aforesaid petitioner and one-Parameswar Tudu (the Petitioner in C.R.R. No.2249 of 2000). The Petitioner was stated to be a Senior Bank Manager of the Central Bank of India, Purulia Branch while Parameswar Tudu (the Petitioner in C.R.R. No.2249 of 2000) was stated to be Deputy Post-Master of the Head Post Office, Purulia. As the details of the complaint case have been enumerated in the Petition of Complaint, I need not repeat the same here.

5. The learned Judge by his Order No. 1 dated 25.8.2000 took cognizance on the basis of the said Petition of Complaint after perusing the same and fixed 28.8.2000 for production of the relevant original documents relied upon by the Opposite Party No. 1.

6. By the Order No.2, dated 28.8.2000 the learned Judge further took cognizance under Sections 403,404,409,420,120B and 34 of the Indian Penal Code and Section 5(2) of the said Act against the Petitioner and the said Parameswar Tudu and issued Warrant of Arrest fixing 20.9.2000 for execution, return and appearance.

This prompted the petitioner to move this Court.

7. On behalf of the petitioner it was submitted that the cognizance taken by the learned Judge and subsequent order for issuance of Warrant of Arrest should be set- aside on the premises that the learned Judge took cognizance without examining the complainant who was not a public servant and in the absence of any sanction the petitioner and the said Parameswar Tudu could not be proceeded against as both of them were public servants. Developing his argument in this regard, the learned lawyer for the petitioner quoted from Section 200 of the Code of Criminal Procedure (for short the said Code) and submitted that as the opposite party No. I in his personal capacity had preferred, the Petition of Complaint and he was not a public servant - it was incumbent upon the learned Judge to have examined him in accordance with Section 200 of the said Code. He further submitted that the cognizance taken by the learned Judge was not proper as the Petition of Complaint did not fall within the purview of the first proviso of Section 200 of the said Code.

He has relied on the decision of the Supreme Court in the case of A.R.Antulay v. Ramdas Sriniwas Nayak and Anr., 1984 SCC (Cr.) 277. Laying emphasis in paragraph 31 of the said judgment lie has submitted that although there was no bar on a

private person to file a complaint before a Court of special Judge but yet his examination is necessary and as the learned Judge in the instant case has failed to do so he prayed for setting aside the order issuing the Warrant of Arrest but, however, in his usual fairness submitted that the cognizance could not be disturbed.

8. Further, the question of want of sanction was also very heavily emphasised by him with references to paragraph 11 of the Petition of Complaint. He has quoted from the same which reads as follows:

That the complainant prayed for sanction and sent pleader''s notices and letters, submitted as ''annexures'' but till date no reply has come and that is why, your complainant waited for the same till dated.

and showed that it is the own case of the opposite party No. 1 that he had prayed for sanction and has not yet received any Order for sanction as such the learned Judge ought not to have proceeded further in the absence of any sanction. The learned lawyer appearing for the petitioner canvassed that the question of sanction could now be taken even at the preliminary juncture in view of the latest. Three Judges Bench decision of the Supreme Court in the case of Abdul Wahab Ansari v. State of Bihar, JT2000 (Supp) 1 SC 529.

9. The learned lawyer appearing for the opposite party No. I in this application argued that cognizance once taken by the learned Magistrate cannot be disturbed only on the ground of non-examination of the Complainant. He has pointed out that the cognizance was taken by the learned Judge under sub-clause (a) of sub-section (1) of Section 190 of the said Code and since the Petition of Complaint disclosed an offence the learned Judge had rightly taken cognizance and non-examination of the opposite party No. 1 would not be vital.

He has also relied on the decision of the Supreme Court reported in State of West Bengal Vs. Bejoy Kumar Bose and Others, in support of his submission that such non-examination of the complainant would not be material and on this score the cognizance could not be invalidated.

10. The learned lawyer appearing for the State adopted the submissions of the learned lawyer for the opposite party No. 1 He also argued that in the absence of examination of the complainant by the learned Judge the proceeding could not be vitiated and also the question of sanction did not matter much as the petitioners although public servant committed the offence which was not in discharge and/or part of their official duty. He has prayed for dismissing the revisional application as it did not have any force.

Illumined by the light of the various submissions advanced by the learned Counsels on behalf of respective parties and being guided by the decisions of the Apex Court I proceed to seek an answer for the proposition which has fallen for consideration before this Court. It is no doubt true that Section 200 of the said Code speaks of

examination of the complainant by a Magistrate taking cognizance of an offence and in the event if he is a public servant acting or purporting to act in discharge of his official duty or the Court has made the complaint etc. as contemplated under the first proviso of the said Section the provision for examining the complainant can be waived.

11. In the present case we find the learned Judge did not examine the complainant (opposite party No. I) and issued the Warrant of Arrest against the petitioner. From the said decision relied upon on behalf of the petitioner in A.R.Antulay v. Ramdas Sriniwas Nayak and Anr., (supra) the Supreme Court had laid down the proposition when a private complaint is filed the Court has to examine the complainant on oath barring the cases set out in the proviso of Section 200 of the said Code the Hon''ble Supreme Court in case of A.R.Antulay v. Ramdas Sriniwas Nayak and Anr.(supra) was dealing with a question that whether on a basis of Petition of Complaint the proceedings of the Special Court could be switched on and in this regard, their Lordships of the Constitution Bench held that the Special Court is a court of original criminal jurisdiction and can take cognizance of an offence even on a private complaint but the Court has to examine the complainant on oath except in the case of the proviso of Section 200 of the said Code and then to proceed in accordance with law as to whether a case is made out for issuing of process.

12. In my humble view the decision cited on behalf of the petitioner cannot in any manner be disputed on the proposition that the Special court as a Court of original jurisdiction can always take cognizance even on the basis of a complaint filed by a person other than a public servant and in such event the Special court has to examine such person who is the complainant and then to proceed with Section 200 of the said Code -1 most respectfully bow down to the decisions of the Hon''ble Apex Court of the Constitution Bench Judgment of A.R.Antulay v. Ramdas Sriniwas Nayak and A nr. (supra). But the said decision in my humble view cannot be squarely applicable in the facts of the instant case.

13. But as here the point is otherwise and we have to arrive at the root of the problem. I have to seek the answer to the question posed in the prelude. Will non-examination of a complainant before issue of process (to be read as issuance of Warrant of Arrest in the present case) is such an illegality which would vitiate the entire proceeding? In my opinion if one delves a bit deep into the problem it is to be seen whether such non-examination can invalidate a proceeding.

14. We have to give the Law always a practical meaning. The question that arises before the Court in the event a procedure has not been properly adopted as to whether it is such an illegality which is an incurable irregularity because of prejudice leading to a failure of justice or whether it is a mere irregularity curable u/s 465 of the said Code. It has to be seen that as to whether the defect that has occasioned has caused failure of justice or prejudice to the accused and have affected him adversely.

15. In the instant case I find that the Petition of Complaint makes out a very clear case against the accused person and simply for the failure to examine the complainant on oath, cannot vitiate the entire proceeding and in my view, it is at best a mere irregularity curable u/s 465(1) of the said Code. As in the court of the learned Special Judge the non-examination of the complainant cannot operate to the prejudice, as a proper case has been made out against the accused in the Petition of Complaint and the same was otherwise maintainable it cannot be said that any question or prejudice has arisen.

16. On the contrary, if the Petition of Complaint is dismissed without examining the complainant a question of prejudice may arise. Non-examination of a complainant before issuance of process, if at all, it causes any prejudice it is the prejudice of the complainant and not the accused. Always a practical and realistic approach has to be adopted by the Court unveiling the curtains of traditional veil and the Court should refrain from picking the holes in such veils without adopting a practical approach.

17. In my view, the non-examination of the complainant in this case has not in any manner affected the tenability of the proceeding as otherwise the Petition Of Complaint discloses a clear case against the accused persons and it also cannot be said that there has been any prejudice which has resulted in a failure of justice. As I have discussed herein-in-above it is at best a curable irregularity within the meaning of Section 465(1) of the said Code.

18. The next part of the submission with regard to sanction also need not arrest the attention of this Court. The ratio of the decision in the Three-Judges Bench Judgment of the Supreme Court in the case of Abdul Wahab Ansari v. State of Bihar (supra) cannot be disputed and I respectfully agree with the same as a question of sanction can be raised at any point of time and even at the initial stage. There is no dispute on this regard. But here the question is otherwise. The accused persons in this case have been arrayed in the offence punishable under Sections 403,404,409,420,120B and 34 of the Indian Penal Code and also Section 5(2) of the said Act. I find from the scanning of the Petition of Complaint that the accused persons have misappropriated a sum of Rs. 44,330/ - by encashing the National Savings Certificates of the deceased wife of the opposite party No. 1.I cannot persuade myself to come to the conclusion that these acts committed by the accused persons have been done while acting or purporting to act in the discharge of their official duty. The alleged act committed by the accused persons can never be termed as act committed by them while they are acting or purporting to act in the discharge of their official duty. The commission of the offence having no direct connection or inseparable link with their duties as public servants, in my most humble view the question of sanction is not required.

19. If I am to persuade myself to the submissions, of the learned lawyer for the petitioner that the complainant had prayed for sanction and more so in the absence of any sanction the proceeding was bad in law and the said point should be kept

open for agitation then this Court has to come to the conclusion that it is the part of the official duty of a Bank Manager and the Deputy Post Master not to misappropriate sums of money by way of encashing the certificates of the depositors.

20. Focus may be made on the fact that in the Petition of Complaint. It discloses sufficient ingredient with regard to the offences punishable under Sections 403, 404, 409,420,120B and 34 of the Indian Penal Code and the finding here-in-above arrived at by me fits in perfectly; but there appears to be a rider to the same. Since the complainant had invoked the provisions of Section 5(2) of the said Act and he has chosen the forum of the learned Special Court (in my view Section has been wrongly quoted from the Old Act of 1947). Section 19 of the said Act of 1988 holds the field and previous sanction for prosecution is necessary only for the offence punishable under the said Act. In the event the learned Trial Judge finds material with regard to the offence punishable under the said Act obviously the petitioner would be entitled to raise the question-of sanction at the preliminary stage and the learned Judge should first dispose of the said question and thereafter proceed with the trial in the light of the judgment of Abdul Wahab Ansari v. State of Bihar (supra).

Otherwise, if the learned Judge finds that there are no materials to proceed against the accused persons for the offence punishable under the said Act he shall, in terms of Section 201 of the said Code direct the case for presentation to the jurisdiction Court with endorsement to that effect.

21. As both the points argued on behalf of the petitioner find no merit this revisional application is liable to be dismissed.

Accordingly, having found no merit, the revisional applications are dismissed.

All interim order stands vacated.

22. Needless to say that notwithstanding dismissal of this revisional application the learned judge would be absolutely free to arrive at his conclusion in accordance with law as this Court has not entered into substantial merit of the case and any observation made hereinabove touching on the merit of the case would not be binding upon the learned trial Court as the same is for the purpose of proper dismissal of these applications.

23. The learned Judge, Special Court, is, however, directed to proceed with the Special Court Case No.5 of 2000 with utmost despatch and shall endeavour to close the same definitely within a period of six months from the date of communication of this order.