# Binapani Ghosh and Anr Vs State and Another

**Court:** Calcutta High Court

**Date of Decision:** July 28, 1983

**Acts Referred:** Criminal Procedure Code, 1973 (CrPC) â€" Section 144(2), 195(1), 195(1), 195(1)(a), 195(1)(a) Penal Code, 1860 (IPC) â€" Section 172, 173, 174, 175, 176

**Citation:** 86 CWN 1004

**Hon'ble Judges:** J.N. Chaudhuri, J; B.C. Chakraborty, J

**Bench:** Division Bench

**Advocate:** Chaitanya Chandra Mukherjee, for the Appellant;Manas Ranjan Chakraborty for Opposite Party No. 2 and Sudipto Moitra for State, for the Respondent

**Final Decision:** Dismissed

## Judgement

B.C. Chakrabarti, J.
This criminal revisional application at the in stance of the accused petitioners raises a short question whether the

Magistrate succeeding ""to the office of a Magistrate who had passed an order u/s 144 (2) of the Code of Criminal Procedure and whose order is

alleged to have been violated, is competent to file a complaint u/s 195 (1) (a) of the Code of Criminal Procedure. The facts necessary for our

present purposes may be stated in a short compass as follows:

2. On an application u/s 144 (2) of the Code of Criminal Procedure Sri Masoddi, the then Executive Magistrate, passed an order on 16.8.79

against the petitioners. After the promulgation of the order Sri Masoddi was transferred and was succeeded by Sri R. N. Saha, Executive

Magistrate. Sri Saha lodged a complaint against the opposite parties (the petitioners herein) before the learned Chief Judicial Magistrate at Alipore

u/s 188 of the Indian Penal Code. The learned Chief Judicial Magistrate ultimately transferred the case to the Court of another Judicial Magistrate

for disposal. The Magistrate found that the complaint was incompetent since the filing of a complaint u/s 188 I. P. C. by the successor-in-office of

the Magistrate who passed the order u/s 144 (2) of the Code of Criminal Procedure was illegal.

3. Against this order the opposite party no. 2 moved a motion before the learned Sessions Judge. The learned Judge in disposing of the motion

held that the successor-in-office was competent to file the complaint in view of the provisions of section 35 (1) of the Code of Criminal Procedure.

The order passed by the learned Judicial Magistrate holding that the complaint was not maintainable was set aside and the case was sent back to

the learned Chief Judicial Magistrate for disposal either by himself or by any other Magistrate subordinate to him excepting the particular Judicial

Magistrate whose order was under challenge.

4. Being aggrieved by this order, the petitioners have moved the present revisional application and obtained the Rule.

5. The only point that falls for our consideration is whether Sri R.N. Saha, Executive Magistrate, who succeeded to the office of Sri Masoodi, was

competent to lodge the complaint in his capacity as the Magistrate succeeding to the office of Sri Masoodi.

6. Section 35 of the Code of Criminal Procedure, 1973 reads as follows:

Powers of Judges and Magistrates exercisable by their successors-in-office (1) subject to the other provisions of this Code, the powers and duties

of a Judge or Magistrate may be exercised or performed by his successor-in-office.

Relying upon this provision in the Code, the learned Additional Sessions Judge held that Sri R. N. Saha, who had succeeded Sri Masoodi, was

competent to file the complaint in the exercise of his powers and duties.

7. Mr. Chaitanya Chandra Mukherjee appearing in support of the petitioners on the other hand contends that the power to file the complaint for an

offence u/s 188 I. P. C. is with the public servant concerned or some other public servant to whom he is administratively subordinate. Mr.

Mukherjee"s contention in short is that the public servant concerned here was Sri Masoodi and in his absence the only other person competent to

file the complaint was a public servant who happened to be administratively superior to Mr. Masoodi and none else. In support of this contention

Mr. Mukherjee relied on the case of Bachuram Kar and Others Vs. The State, . In that case a certain order was passed by one Sri Poddar acting

as the Sub-divisional Magistrate. On an allegation of disobedience of that order a complaint was lodged by Sri Poddar. Sri Poddar was, on the

date he filed the complaint not functioning as the Subdivisional Magistrate but as a Magistrate First Class of the same station. A point was taken in

the case that either the Subdivisional Magistrate himself could file the complaint or any officer superior to him could do so but not Sri Poddar who,

when he lodged the complaint, was not the Subdivisional Magistrate. It was held, in that case by a learned single Judge overruling the contention

thus raised that it was the order of Sri Poddar that was alleged to have been violated or disobeyed and the complaint which he made was therefore

a valid complaint, although on the date he was not functioning as the Subdivisional Magistrate. This decision, in our view, does not really lay down

a proposition that when a Magistrate is transferred and is succeeded by another Magistrate the latter cannot competently file a complaint in view of

the provisions of section 195 (1) (a) of the Code. What section 195 (1) (a) provides is that no Court shall take cognizance of any offence

punishable under sections 172 to 188 of the Indian Penal Code, except on the complaint in writing of ""the public servant concerned or of some

other public servant to whom he is administratively subordinate."" In that case the complaint was filed by the public servant concerned which

obviously means the, public servant whose order was alleged to have been violated. Therefore that was a case where the complaint was lodged by

one of the two categories referred to in section 195 (1) (a). Consequently, there can be no question of the complaint being incompetent on the sole

ground that the officer making the complaint was not holding the same office on the date he passed the order. He was nonetheless be the officer

concerned within the meaning of section 195 (1) (a).

8. In the instant case before us if the complaint had been filed by Sri Masoodi, it would come squarely within the meaning of the decision referred

to above. But here the complaint has been filed by the successor Magistrate. Section 35 (1), as we have already indicated, provides that the

powers and duties of the Magistrate may be exercised or performed by his successor-in-office subject to the other provisions of this Code. The

expression subject to the other provisions of this Code only means that in exercising the powers and duties with the aid of section 35 there should

be no conflict with any other provision in the Code itself. If we hold, as we are inclined to do, that a successor-in-office of a Magistrate is entitled

to file a complaint, that, in our view, would not be in any way in conflict with the provisions of section 195 (1) (a) of the Code. We have already

indicated that section 195 (1) (a) empowers the public servant concerned to lodge a complaint. In the instant case, the public servant concerned is

a Magistrate. Section 35 provides that the powers and duties of a Magistrate may be exercised by the successor-in-office. In the event of violation

of an order passed by a Magistrate the Magistrate has the power and also the duty to lodge a complaint u/s 195 (1) (a). This power and duty, in

our view, can be exercised by the successor-in-office of a Magistrate in view of the provisions of section 35 (1) of the Code. In doing so, he does

not cease to be a public servant within the meaning of section 195(1)(a). Therefore, if the successor Magistrate lodges a complaint, it cannot be

said that he does otherwise than as a public servant. If he is a public servant, he is certainly competent to file the complaint. The position has been

considered in a Supreme Court decision in the case of Ajaib Singh and Another Vs. Joginder Singh and Another, . In that case their Lordships

observed in explaining the provisions of section 559 of the old Code of Criminal Procedure which is exactly similar in language to section 35 of the

present Code that a successor-in-office of a Magistrate can file a complaint u/s 476 of the Code of Criminal Procedure in respect of an offence u/s

195 I. P. C. committed before his predecessor-in-office. Mr. Mukherjee wanted to distinguish this case on the ground that their Lordships were

considering a complaint u/s 195 (1)(b) of the Code of Criminal Procedure which speaks of complaint by a Court or some other Court to which

that Court is subordinate. This, in our view, makes no difference so far as the fundamental proposition laid down in the decision above is

concerned. Their Lordships in considering the scope of section 559 (1) which corresponds to section 35 (1) of the present Code in unmistakable

terms have laid down that a successor Magistrate is competent to file a complaint obviously in his capacity as a successor.

9. Considered in that light we are also of the view that section 195 (1) empowers a public servant to lodge a complaint and a successor Magistrate

is a public servant within the meaning of section 35 (1) of the Code. It is true that in section 195 (1) (a) the expression used is the public servant

concerned or some other public servant to whom he is administratively subordinate."" It is not stated here that the complaint should be by the

Magistrate concerned or by the Magistrate to whom he is subordinate. The Legislature in its wisdom avoided using such an expression because

public servant may include many other categories of officers besides a Judge or a Magistrate. Therefore, if section 195(1) used the expression

Magistrates or Judges only in place of public servant, it could have disentitled other categories of public servants from lodging a complaint. But that

is not the scheme of the Act nor the intention of the Legislature. A Magistrate being a public servant and a successor being also a public servant

entitled to exercise all the powers and duties of his predecessor-in-office in our view is competent to file the complaint. To hold, as we have held,

that a successor Magistrate falls within the category of a public servant would be quite in conformity with section 195 (1) (a) of the Code and

therefore the complaint lodged by him could be, in our view, a competent one lodged by one falling in the first of the two categories referred to in

that section.

The view we have taken find support in a decision of this Court in the case of Manicklal Bhagat vs. The State & Anr. 1982 (1) C. H. N. 149. This

also is a judgment by a learned single Judge and it has been held therein that the power to make a complaint conferred by section 195(1) (a) is not

a personal privilege and can be exercised by a public servant who for the time being holds the same office by reason of succeeding to that office on

the transfer of the officer making the order allegedly violated. The decision in the case of BachuramKar & Ors. vs. the State (Supra) relied on by

Mr. Mukherjee does not, in our view, hold any contrary proposition. It only holds in the facts and circumstances of that particular case that the

public servant concerned viz., the particular public servant whose order was allegedly violated though not holding the same office at the time of

making the order was competent to file the complaint. His Lordship was not concerned with the question as to the defect of section 35 or for the

matter of that section 559 (1) of the Code as it then stood.

In that view of the matter we find that the complaint lodged in this case by the Magistrate was a competent one. We, therefore, do not find

anything to justify interference with the impugned order.

We however, make it clear that we have refrained from making any observations with regard to the merits of the allegations in the complaint since

that is irrelevant for our present purposes and beyond the scope of the present application. That is a question which is left open for consideration at

the appropriate stage.

The application therefore fails and is dismissed and the Rule is accordingly discharged. Let the records be sent down as soon as possible.

Jitendra Nath Chaudhuri, J.

I agree.