(1993) 02 BOM CK 0121

Bombay High Court

Case No: Criminal Writ Petition No. 1609 of 1992

Smt. Laxmi Kishore Tonsekar		APPELLANT
	Vs	
State of Maharashtra		RESPONDENT

Date of Decision: Feb. 16, 1993

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 202, 93
- Penal Code, 1860 (IPC) - Section 114, 34, 403, 406, 408

Citation: (1993) 2 ALT(Cri) 14 : (1993) 3 BomCR 65 : (1993) CriLJ 2772 : (1993) 1 MhLj 609

Hon'ble Judges: Ajit P. Shah, J

Bench: Single Bench

Advocate: A.P. Mundargi, for M/s. Jayesh J. Kanani and Pravina J. Kanani, for the Appellant; Mr. Palekar, Assistant Public Prosecutor, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. Rule. Rule made returnable forthwith. Mr. Palekar, learned A.P.P., waives service. By consent, petition taken on board for final hearing.

2. Has a Magistrate jurisdiction to issue show cause notice to the accused when he holds an enquiry or investigation under S. 202 of the Cr.P.C.; into a complaint of which he is empowered to take cognizance is the question raised in this petition.

3. The petitioner has filed a complaint on 28th May, 1992 in the Court of learned Metropolitan Magistrate, XXI Court, Bandra, Bombay against (1) Kishore S. Tonsekar and (2) Manorama M. Tonsekar for the offences punishable under sections 403, 406 and 408 read with Sections 34 and 114 of the Indian Penal Code. The petitioner has also filed application under S. 93 of the Cr.P.C. for issuance of search warrant against the accused. On 4th June, 1992, the learned Magistrate recorded the verification of the said complaint by examining the petitioner on oath. The learned Magistrate then adjourned the case from time to time for arguments on the point of

issue of process against the accused. On 22nd June, 1992, the learned Magistrate passed an order to issue show cause notices to the accused persons. The order passed by the learned Metropolitan Magistrate reads as under :-

"Complainant is the wife of accused No. 1 and daughter-in-law of accused No. 2. There is matrimonial dispute between accused and complainant since 1984. There are other litigations pending in other courts also. Considering these above facts and allegations in the complaint to enquire the said case under S. 202 of Cr.P.C. is necessary but instead of sending to police it is better to enquire court himself. So to take statements of the accused are sufficient at the first instance hence issue show cause notice to both accused as why process should not be issued against them as prayed by the complainant."

4. The petitioner challenged the abovesaid order passed by the learned Metropolitan Magistrate by filing Criminal Revision Application No. 264 of 1992 before the Sessions Court, Greater Bombay. The learned Additional Sessions Judge felt that the revision application filed by the petitioner could not be heard without issuing notices to the accused as they were likely to be affected by the order passed in the revision application. The learned Addl. Sessions Judge, therefore, directed the petitioner to join the said accused persons as party respondents in the revision application and issue notices to them. As the petitioner''s Advocate declined to join the said accused as party respondents to the revision application, the learned Addl. Sessions Judge found himself unable to hear, admit and decide the revision application and, therefore, under his order dated 3rd November, 1992, the learned Addl. Sessions Judge dismissed the revision application before admission.

5. Mr. Mundargi, learned counsel for the petitioner, submitted that a person complained against is not entitled to take part in the enquiry or represented by a pleader during the preliminary enquiry under S. 202 of Criminal Procedure Code. He further submitted that the accused has no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not. The learned counsel criticised the impugned order passed by the learned Magistrate as contrary to the express provisions of S. 202 of Cr.P.C.

6. The object of the chapter of the Code in which S. 202 appears is to prevent accused persons being harassed at all or asked to appear if in the opinion of the Magistrate no prima facie case is made out; and the Code never contemplated that, at that stage, they should be either asked or permitted to state their cases. A plain reading of S. 202 of Cr.P.C. shows that in case the Magistrate decides to postpone the issue of process against the accused, and either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, the person complained against is not in picture at all. Such person is entitled to attend the preliminary enquiry like any other member of the public, but he has not locus standi as party. Since the very question for considering being whether he should be called upon to face an accusation, he has no right to take part

in the proceedings, nor has the Magistrate any jurisdiction to permit him to do so. It is no doubt true that it is the duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. But the question whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant. Whether defence the accused might have can only be enquired into at the trial. An enquiry under S. 202 of Criminal Procedure Code can in no sense be characterised as a trial, for the simple reason that in law there can be but one trial for an offence. The limits of the enquiry under S. 202 of Cr.P.C. have been circumscribed and the scope of the enquiry is restricted only to the ascertainment of the truth or falsehood of the complaint, i.e., for ascertaining whether the material facts alleged by the prosecution are true or false, and the provisions of S. 202 of Cr.P.C. are not intended to supersede the regular trial of the case by allowing the accused to make out his defence merely by alleging it without legal proof in support of his allegation. The accused has absolutely no locus standi and is, therefore, not entitled to be heard on the question whether the process should be issued against him or not.

7. In the case of Chandra Deo Singh Vs. Prokash Chandra Bose and Another, , the Supreme Court held that the scheme of Chapter XVI of Cr.P.C. shows that an accused person does not come into the picture at all till process is issued. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the legislature has made no specific provision permitting an accused person to take part in an enquiry in Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, , the Supreme Court observed as follows (Para 4) :-

"The scope of the inquiry under S. 202 is extremely limited - only to the ascertainment of the truth or falsehood of the allegations made in the complaint - (i) on the materials placed by the complainant before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. In fact, in proceedings under S. 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not."

8. The practice of issuing notice to the accused u/s 202 is highly undesirable as it defeats the specific object of S. 202 and might prejudice the accused if the complaint is not dismissed under S. 202. The practice of summoning an accused person at the stage has much greater dangers than safeguards to the accused. He is obviously not bound to appear even if invited or give an opportunity of doing so. If he does not appear, it is likely to weigh against him with the Magistrate, if he does not runs the danger of being committed to a statement of his case before he knows with any

definiteness what exactly is laid to his charge. The impugned order passed by the learned Magistrate issuing show cause notices to the accused is thus clearly illegal and beyond the scope of S. 202 of Cr.P.C.

9. The learned Additional Sessions Judge dismissed the revision application of the petitioner only on the ground that the petitioner refused to join the accused as party respondents to the revision application. In view of the fact that the accused persons had no locus standi to appear before issuance of process, there was no need to join them as party respondents. Since the grievance of the petitioner-complainant was against the issuance of show cause notices to the accused in an enquiry under S. 202 of Cr.P.C., the learned Addl. Sessions Judge was not justified in insisting upon joining the accused in revision application. The persons mentioned as accused cannot be said to be prejudicially affected by reason any direction for further enquiry under S. 202 of Cr.P.C. passed either by the Sessions Court or by the High Court. The learned Addl. Sessions Judge was thus in error in dismissing the revision application.

10. The petition must, therefore, succeed. The order dated 22nd January, 1992, passed by the learned Metropolitan Magistrate, XXI Court, Bandra, Bombay, in C.C. No. 59/Misc./92 and the order dated 3rd November, 1992, passed by the learned Addl. Sessions Judge, Greater Bombay, in Criminal Revision Application No. 264/1992 are quashed and set aside. The learned Metropolitan Magistrate is directed to hear the petitioner and thereafter pass appropriate orders on the complaint filed by the petitioner as well as application for search warrant in accordance with law.

11. Petition allowed.