

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Cri M.C. No. 2626/2009**

Judgment reserved on: 6.11.2009
Judgment delivered on: 05.02.2010

Parkash Devi & Ors. Petitioner
Through: Mr. R.N. Vats, Advocate

versus

State of Delhi & Anr. Respondent
Through: Mr. Saurabh Sharma, Advocate

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

KAILASH GAMBHIR, J.

1. By this petition filed under Section 482 Cr.P.C., the petitioner seeks quashing of the order dated 22.1.2008 passed by the

court of Sh. Praveen Kumar, ASJ, Karkardooma Courts, Delhi in Criminal Revision No. 4/2008.

2. Brief facts relevant for deciding the present petitioner are that father of Mr. Krishan Kumar, herein respondent No.2, and Mr. Ved Prakash, husband of petitioner No.1 and father of petitioner Nos. 2 to 5, are real brothers. Sh. Ram Chander, grand father of both the parties i.e. petitioner Nos. 2 to 5 and respondent No.2 purchased the property in dispute, measuring 280 sq yards 1259, Subhash Road,Vishal Market, Gandhi Nagar. After the death of Sh. Ram Chander, the property devolved upon their grand-mother Smt. Angoori Devi who executed a registered will in 1980 in favour of her two sons, namely, Sh. Jagdish Prasad and Sh. Ved Prakash in respect of the disputed property. The said property was bequeathed by both of them on their legal heirs i.e. petitioners 2 to 5 and respondent No.2 respectively. Respondent no 2 alleged that Mr. Ved Prakash had left a will in favour of Jagdish Prasad for shop no 19 and the petitioners had taken illegal forcible possession of the said shop. On the basis of this allegation, both the respondent and his mother, Smt Raj Rani, filed suit No 983/2006 under Section 6 of the Specific Relief Act r/w Section 151

of CPC for restoration of possession of the shop along with another suit no 875/2006. Respondent no 2 filed a criminal complaint case in court of Chief MM Delhi on 28.06.2006. The Ld MM on the basis of material on record directed enquiry by the police and on the basis of the status report filed by the police, the court dismissed the complaint case no 67/06 under section 380/454/506/120A IPC by order dated 8.10.2007. Aggrieved by the said order, respondent no 2 filed a criminal revision petition no 4/2008 U/s 397 of Cr.P.C. The learned revisional court vide order dated 22.1.2008 set aside the impugned order dated 8.10.2007 and granted respondent no 2 an opportunity to lead pre summoning evidence. As per the direction of the revisional court the Id MM examined the complaint and vide order dated 25.2.2009 found prima facie ample material on record to summon the petitioners. Feeling aggrieved with the revisional order dated 22.1.2008 and by all the subsequent proceedings, the present petition has been filed.

3 . Counsel for the petitioner stated that the complaint filed by the respondent was dismissed by the concerned Magistrate under Section 203 of the Code of Criminal Procedure. Counsel thus submitted that dismissal of the complaint of the respondent was after

the Magistrate had taken cognizance of the complaint case filed by the respondent. The petitioner was entitled to be heard by the revisional court as would be borne out from Section 401 (2) of the Code of Criminal procedure as the petitioner in any case falls under the category of "other person" if not at the stage under the category of an "accused". Counsel for the petitioner placed reliance on the following judgments :-

1. **Adalat Prasad Vs. Roop Lal Jindal & Ors. JT 2004 (7) SC 243,**
2. **Mohd. Afzal & Ors. Vs. Mst. Noor Nisha Begum & Ors. 1997 JCC 256 (DHC),**
3. **R.P. Sablok Vs. Smt. Kaushalaya Devi 1982 Cr.L.J.1342 (DHC)**
4. **Prabha Mathur Vs. Pramod Aggarwal JT 2008 (10) SC 501**
5. **Raghu Raj Singh Rousha Vs. M/s Shivam Sundaram Promoters (P) Ltd. 2009 (1) RCR (Cri.) 531**

4 . Refuting the said submissions of the counsel for the petitioner, the counsel for the respondent submitted that the complaint filed by the respondent was dismissed by the Magistrate *in limine* without examining the complaint and since the accused persons were never summoned as yet, therefore, they were not entitled for a hearing by the revisional court. In support of his arguments counsel for the

respondent placed reliance on the judgment of this court in **Tata Motors Ltd. Vs. State** (decided on 12.2.2009 in Crl. R. P. No. 16/2008 and Crl. M.A. No. 4301/08).

5 . I have heard learned counsel for the parties.

6 . The short issue that requires consideration in the present case is that:-

“Whether the person named as an accused in the complaint case is entitled to a hearing by the revisional Court under Section 401(2) of the Code of Criminal Procedure, where such a complaint has been dismissed by the Magistrate under Section 203 Cr.P.C.?”

7. Mr. R.N. Vats, Ld. counsel appearing for the petitioner strongly canvassed for such a notice by the revisional Court under the mandate of Section 401(2) of the Code of Criminal Procedure and also such notice being in conformity with the principles of natural justice and fair play. The main thrust of the arguments of counsel appearing for the petitioner was that once the learned Magistrate has taken cognizance of the offence and proceeds by either dismissing the complaint of the complainant or by issuing the process, the accused becomes entitled to be heard in a criminal revision filed by

the complainant, either before the Sessions Court or before the High Court. Counsel further submitted that even if the Magistrate dealing with the complaint finds no sufficient cause for proceeding with the case after considering the evidence of the complainant and his witnesses and the result of the enquiry or investigation, if directed under Section 202 Cr.P.C., he may dismiss the complaint under Section 203 Cr.P.C. or if in the opinion of the Magistrate there is sufficient material to proceed against the accused, then he may proceed under Section 204 under Chapter XVI of the Code of Criminal Procedure.

8. Before proceeding further it would be pertinent to reproduce sections 202-204 of the Code of Criminal Procedure as under:-

"Section 202 - Postponement of issue of process

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under section 192, may, if he thinks fit¹ [and shall in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction], postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200 .

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

Section 203 - Dismissal of complaint

If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

Section 204 - Issue of process

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be—

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87."

9. As would be evident from the above provisions, the journey of a private complaint begins from Section 200 of the Code of Criminal Procedure when the Magistrate taking cognizance of an offence, examines on oath the complainant and the witnesses present, if any, and if on such material the Magistrate comes to the conclusion that a sufficient case has been made out for summoning the accused, then the Magistrate may proceed to issue process under Section 204 Cr.P.C. However, if the Magistrate at that very stage finds that no prima facie case has been made out by the complainant and there is no sufficient ground for proceeding against the accused, then he may straightaway dismiss the complaint under Section 203 Cr. P.C. The Magistrate in the given facts of the case after examining the complainant and the

witnesses, may also proceed under Section 202 Cr.P.C. to further inquire into the case either himself or direct an investigation to be conducted by a police officer or by such other person as he thinks fit so as to decide whether or not there is sufficient ground to proceed in the matter. Even after holding an enquiry under Section 202, the option before the Magistrate would again be either to proceed under Section 203 or under Section 204 of the Code of Criminal Procedure. If after considering the entire material on record the Magistrate finds that there is sufficient ground to proceed with the complaint he can issue process by way of summoning the accused under Section 204 of Cr.P.C. and if the Magistrate taking a prima facie view of the matter does not find that any sufficient material exists to proceed against the accused then he can dismiss the complaint under Section 203 of Cr.P.C.

10 . In ***Adalat Parsad's case (Supra)*** the Apex Court clearly held that at no other stage before issuing of process under Section 204 Cr.P.C., the Code has provided for hearing the summoned accused. It would be worthwhile to refer to the following paras of the said judgment:-

"11. We will examine the above findings of this Court in the background of the scheme of the Code which provides for consideration of complaints by Magistrates and commencement of proceedings before the Magistrate which is found in Chapters XV and XVI of the Code;

12. Section 200 contemplates a Magistrate taking cognizance of an offence on complaint to examine the complainant and examine upon oath the witnesses present if any. If on such examination of the complaint and the witnesses, if any, the Magistrate if he does not want to postpone the issuance of process has to dismiss the complaint under Section 203 if he comes to the conclusion that the complaint, the statement of the complainant and the witnesses has not made out sufficient ground for proceeding. Per contra if he is satisfied that there is no need for further inquiry and the complaint, the evidence adduced at that stage has materials to proceed, he can proceed to issue process under Section 204 of the Code

13. Section 202 contemplates: postponement of issue of process : It provides that if the Magistrate on receipt of a complaint if he thinks fit, to postpone the issuance of process against the accused and desires further inquiry into the case either by himself or directs an investigation to be made by a Police Officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding, he may do so. In that process if he thinks it fit he may even take evidence of witnesses on oath, and after such investigation, inquiry and the report of the Police if sought for by the Magistrate and if he finds no sufficient ground for proceeding he can dismiss the complaint by recording briefly the reasons for doing so as contemplated under Section 203 of the Code.

14. But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under Section 204 of the Code. Therefore what is necessary or a condition precedent for issuing process under Section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under Section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under Section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise

at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in Mathew's case before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Sections 200 and 202, and the only stage of dismissal of the complaint arises under Section 203 of the Code at which stage the accused has no role to play therefore the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint under Section 203 of the Code for a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage”.

11. In another recent judgment of this Court in **Tata Motors Ltd. Vs. State** (Supra) Hon’ble Dr. Justice S. Muralidhar discussed the issue in detail after considering the ratio of a number of judgments such as **Chandra Deo Singh vs Prokash Chandra Bose @ Chabi Bose (1964) AIR 1963 SC 1430; A.K. Subbaiah vs State of Karnataka 1987 (4) SCC 557; Prabha Mathur vs Pramod Aggarwal (2008) 9 SCC 469; Raghu Raj Singh Rousha vs Shivam Sundaram Promoters (P) Ltd. 2008 (16) Scale 369** and crystallized the legal position in the following para:-

"20. The legal position that emerges from the above decisions of the Supreme Court and this Court is as under:

(1) There is a distinction to be drawn between the criminal complaint cases which are at the pre-cognizance stage and those at the post-cognizance stage. There is a further

distinction to be drawn between the cases at the post-cognisance but pre- summoning stage and those at the post-summoning stage.

(2) It is only at the post-summoning stage that the respondents in a criminal complaint would answer the description of an 'accused.' Till then they are like any other member of the public. Therefore at the pre-summoning stage the question of their right to be heard in a revision petition by the complainant in their capacity as "accused" in terms of Section 401(2) CrPC does not arise.

(3) At the post-cognisance but pre-summoning stage, a person against whom the complaint is filed might have a right to be heard under the rubric of 'other person' under Section 401(2) CrPC. If the learned MM has not taken the cognizance of the offence then no right whatsoever accrues to such "other person" to be heard in a revision petition.

(4) Further, it is not that in every revision petition filed by the complainant under Section 401(2) CrPC, a right of hearing has to given to such "other person" or the accused against whom the criminal complaint has been filed. The right accrues only if the order to be passed in the revision petition is prejudicial to such person or the accused. A order giving a specific direction to the learned MM to either proceed with the case either at the post-cognisance or post-summoning stage or a direction to register an FIR with a direction to the learned MM to proceed thereafter might be orders prejudicial to the respondents in a criminal complaint which would therefore require them to be heard prior to the passing of such order."

12. The mandate of the law is that no order under Section 401(2) shall be passed by the revisional Court to the prejudice of the accused or other person unless he has had an opportunity of being heard, either personally or by pleader in his own defence. The hearing

envisaged in the Section is to the “accused” or to the “other person” and, therefore, the pertinent question which arises is;

“whether a person who has not yet been made an accused be entitled to an opportunity of being heard in the matter”?

13 . In **Chandra Deo Singh (supra)** the Apex Court clearly held that the accused person does not at all come in the picture till the process is issued against him. The only right of the accused till the process is issued against him is to remain present either in person or through his counsel just with a view to remain informed as to what is going on in the complaint case where he has been made an accused. The rationale here was that “since the very question for consideration being whether he should be called upon to answer a question which he has no right to take part in the proceedings nor the Magistrate has any jurisdiction to permit him to do so”. It would be useful to refer to the following para from the said judgment:-

“6. Taking the first ground, it seems to us clear from the entire scheme of Ch. XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration 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 would follow from this, therefore, that it would not be open to the Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued; nor can he examine any witnesses at the instance of such a person. Of course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice. But beyond that, he cannot go. It was, however, contended by Mr. Sethi for respondent No. 1 that the very object of the provisions of Ch. XVI of the Code of Criminal Procedure is to prevent an accused person from being harassed by a frivolous complaint and, therefore, power is given to a Magistrate before whom complaint is made to postpone the issue of summons to the accused person pending the result of an enquiry made either by himself or by a Magistrate subordinate to him. A privilege conferred by these provisions can, according to Mr. Sethi, be waived by the accused person and he can take part in the proceedings. No doubt, one of the objects behind the provisions of s. 202, Cr.P.C. is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden 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. 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. Whatever defence the accused may have can only be enquired into at the trial. An enquiry under s. 202 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. 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. It is true that there is no direct evidence in the case before us that the two persons who were examined as court witnesses were so examined at the instance of respondent No. 1 but from the fact that they were persons who were alleged to have been the associates of respondent No. 1 in the first information report lodged by Panchanan Roy and who were alleged to have been arrested on the spot by some of the local people, they would not have been summoned by the Magistrate unless suggestion to that effect had been made by counsel

appearing for respondent No. 1. This inference is irresistible and we hold that on this ground, the enquiry made by the enquiring Magistrate is vitiated. In this connection, the observations of this court in *Vadilal Panchal v. Dattatraya Dulaji Ghadigsonkar* : [1961]1SCR1 , may usefully be quoted :

"The enquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage for the person complained against can be legally called upon to answer the accusation made against him only when a process has issued and he is put on trial."

14 . With regard to the words "other person" appearing in Section 401(2) it has been discussed in the case of ***Prabha Mathur Vs. Pramod Aggarwal (supra)*** that:-

*"16. Having heard the learned Counsel for the parties, in our opinion, the appeal deserves to be allowed. It is no doubt true, as held by this Court in *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Ors.* : 1976CriLJ1533 and reiterated in several other cases that the accused has no **locus standi** at the stage of investigation and he cannot insist for hearing before process is issued against him. It was also held in *Chandru Deo Singh v. Prokash Chandra Bose and Anr.* : [1964]1SCR639 and in *Shashi Jena and Ors. v. Khadal Swain and Anr.* AIR (2004) 4 SCC 236 that at the most, an accused may remain present with a view to be informed as to what is going on and nothing more. **It is equally correct that if a person has no locus standi or right of hearing, such right does not accrue in his favour by an indirect process.**"*

Also in the case of **Chitra Narain vs NDTV 109(2004) DLT 394** in answer to the question whether the person against whom the complaint is filed has a right to participate in a revision petition, the answer was given in the negative. It was held that "**unless a person becomes an accused after process is issued against him, his presence is like any member of the public.**" It was explained that "**a person against whom a complaint is filed does not become an accused until Court decides to issue process against him.**" Yet again, in the case of **Tata Motors vs. State (supra)** it was held by this court that:

"22. Even if the applicants were to be "other persons" for the purpose of Section [401\(2\)](#) Cr PC, their right to be heard arises only when and if this Court proposes to pass an order prejudicial to them. The respondents cannot possibly anticipate what order this Court is going to pass. In seeking intervention at an anterior stage, they are really seeking to put the cart before the horse. The Court might well not agree with the complainant and dismiss the revision petition. In that sense, their application is premature."

15. In the backdrop of the aforesaid legal position and applying it to the facts of the case at hand, it would be evident that the Magistrate had dismissed the complaint filed by the complainant under Section

203 of the Code of Criminal Procedure as the learned Magistrate after taking into consideration the status report filed by the police and the other material on record came to the conclusion that the Civil Court, where already the complainant had filed his suit, would afford him the appropriate remedy to prove his right, possession and title of the property. Since the Magistrate did not examine the complainant and the other witnesses as per the mandate of Section 200 of Cr.P.C. therefore, in the revision filed by the respondent the matter was remanded back by the revisional Court with the direction to the Magistrate to grant another opportunity to the respondent to lead pre-summoning evidence and to proceed in the matter in accordance with law.

16 . The grievance of the petitioner is that before the revisional Court, neither the petitioner was impleaded by the respondent complainant nor the revisional Court afforded any hearing to the petitioner, and hence prejudice has been caused to his rights and he claims his right of being heard under Section 401(2) of the Code of Criminal Procedure. As already discussed above, the character of the petitioner was still not that of an accused as the complaint filed

by the respondent was dismissed under Section 203 Cr.P.C. and since the matter was remanded back to the Magistrate to grant opportunity to the complainant to lead pre-summoning evidence, therefore, the said order does not cause any prejudice to the rights of the petitioner. Even after the said remand, the fate of the complaint case could either be dismissal under Section 203 or under 204 Cr.P.C., if the Court with the fresh material before it, comes to the conclusion to proceed against the respondent. Since in the present case the process was not yet issued against the petitioner and the complaint was dismissed under S. 203 of Cr.P.C., therefore, preceding the said stage, the petitioner had no right to seek opportunity of hearing before the Revisional Court in the light of the legal position discussed above.

17. As with regard to the contention of the petitioner that the rules of natural justice have been violated as no opportunity of being heard has been given to the petitioner, it would be pertinent to refer to the judgment of the Madras High Court in ***S. Thiyagrajan Vs. Ayyamperumal & Anr. (1983) 2 Crimes 765 Mad*** where this issue has been authoritatively addressed :-

"14. As regards the contention that natural justice requires that the petitioner should have been given notice by the learned Sessions Judge before disposing of the Criminal revision petition, I am aware that even if there is no specific provision for notice in the statute, provision must be read into the law in certain circumstances. The concept of natural justice has got its own natural limitations. It cannot be too vague and stretched to an extent of breaking of systems of recognized law. No person has a vested right in any course of procedure. It is for the legislature at any time to change the mode of procedure. In construing a statute the court is not at liberty to stretch to square with the theory or that theory. The Court has no power to go behind the intention of the legislature on the pretext of natural justice. Courts are to interpret the laws and not make them and must firmly refuse to fill in a lacuna even though the refusal may work hardship in an individual case.

15 . Coming to the case on hand, it is relevant to note the 41st Report of the Law Commission on the subject:

"32. 10. One suggestion made to us regarding Section 436 was that before an order dismissing a complaint under Section 203 is disturbed, notice should go to the accused person so that he can urge what he likes in support of the dismissal order. This was sought to be supported by the principles of natural justice. We do not however, see how such an accused person can be called, "a party to the proceedings" at that, stage, and the Supreme Court has ruled at *Chandra Deo V. Prakash Chandra* that it is hardly proper to intervene in the proceedings. Further, in a number of cases, it will happen that notice to him will seem unnecessary trouble and expense to a person who may be wholly innocent. If a Magistrate has, on considering the facts found that there is no ground for proceeding against any person and therefore, dismissed the complaint summarily there is hardly any reason for the revision court to call anyone to court as an accused, or as a respondent until, of course, after a further inquiry has been made, and that inquiry justifies the issuing of process."

16 . The above passage makes it abundantly clear that the guideline for the statute is that in a revision against the order of dismissal of a complaint under Section 203, Criminal Procedure Code, no notice need be given to the accused. No restraints and conditions which the legislature itself did not think proper or necessary to impose can be brought in by the backdoor on the concept of natural justice."

Therefore, the case of the petitioners cannot be said to be justified as the concept of principles of natural justice cannot be introduced where the mandate of law is otherwise.

18. Hence in the light of the above discussion, I do not find any merit in the present petition and the same is hereby dismissed.

February 05, 2010

KAILASH GAMBHIR,J