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BAL MANOHAR JĀLAN

v.

SUNIL PASWAN & ANR.

(Criminal Appeal No.1247 of 2014)

JUNE 30, 2014

B

[T.S. THAKUR AND C. NAGAPPAN, JJ.]

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Code of Criminal Procedure, 1973 - s.401(2) - Right of hearing given to accused under - Compliance of - Held: In a criminal revision before the High Court, accused person cannot be deprived of hearing on the face of the express provision contained in s. 401(2) of the Code.

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The father of the respondent no.1 filed a complaint against five accused persons. The appellant was mentioned as accused No.4 in First Information Report. The complainant filed a protest-cum-complaint petition in the said case. Final report was filed, cognizance was taken against accused no.1 alone for the alleged offences u/s 328 and 302 IPC and the other four accused mentioned in the FIR were discharged from the case. The protest-cum-complaint petition was also rejected. The complainant died. Respondent no.1 filed the Criminal Revision under Section 397 and 401 Cr.P.C. and the High Court without issuing notice to the concerned accused passed the order. Hence, the instant appeal.

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Allowing the appeal, the Court

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HELD: 1.1. In the instant case, challenge is laid to order at the instance of the complainant in the revision petition before the High Court and by virtue of Section 401(2) of the Code of Criminal Procedure, 1973, the accused mentioned in the First Information Report get the right of hearing before the revisional court although

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the impugned order therein was passed without their participation. The appellant who is an accused person cannot be deprived of hearing on the face of the express provision contained in Section 401(2) of the Code and on this ground, the impugned order of the High Court is set aside and the matter is remitted back. [Para 8] [906-C-E]

1.2. Though other grounds such as charge-sheet having been filed and the cognizance has been taken against accused No.1, the protest petition cannot be treated as a complaint warranting an independent inquiry, have been raised in this appeal, it is not necessary to consider the same since the matter is remitted for fresh consideration and it is open to the appellant to raise them before the High Court. [Para 9] [906-E-F]

Manharibhai Muljibhai Kakadia and another vs. Shaileshbhai Mohanbhai Patel and others 2012 (8) SCR 1015:(2012) 10 SCC 517 - referred to.

Case Law Reference:

2012 (8) SCR 1015 Referred to Para 5, 7

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 1247 of 2014

From the Judgment and Order dated 18.04.2011 in CRLR
No. 830/2009 of the High Court of Patna.

Gaurav Agrawal for the Appellant.

S.B. Upadhyay (A.C.), Santosh Mishra, Vijaiendra Nigam,
Krishnam Mishra, Param Mishra, Kaustv P. Pathak, Gopal
Singh, Manish Kumar, Shubhra Rai for the Respondents.

The Judgment of the Court was delivered by

C. NAGAPPAN, J. 1. Leave granted.

A 2. This appeal is preferred against the impugned order dated 18.4.2011 passed by the High Court of Judicature at Patna in Criminal Appeal No. 830 of 2009 whereby the High Court allowed the Criminal Revision filed by the respondent No.1 herein.

B 3. The facts necessary for the disposal of the present
C appeal are stated as follows: The father of the respondent No.1
D herein filed a complaint on 24.5.2003 against five accused
E persons alleging therein that they had committed murder of son
F of the complainant by name Anil Paswan by administering
G poison. A case was registered in First Information Report
H No.96 of 2003 on the file of Chowk Police Station, Patna City, on 28.5.2003 against 5 accused persons for the alleged offences under Section 328/302/34 IPC. During investigation, the complainant filed a protest-cum-complaint petition on 7.6.2003 which was kept on record. The investigation officer submitted the final report in the case on 31.5.2008 against accused No.1 Sunita Devi alone under Section 328/302 IPC for the murder of Anil Paswan. The Addl. Chief Judicial Magistrate, Patna City, perused the charge-sheet and the case diary as well as the protest-cum-complaint petition dated 7.6.2003 and took cognizance for the offences under Section 328/302 IPC against accused No.1 Sunita Devi and discharged accused Nos. 2 to 5 in the First Information Report from the case and rejected the protest-cum-complaint petition filed by the complainant by his order dated 4.3.2009. Aggrieved by the rejection of the protest-cum-complaint petition Sunil Paswan, the son of complainant late Harinandan Paswan filed revision petition in Criminal Revision No.830 of 2009 on the file of the High Court of Judicature at Patna under Section 397 and 401 of the Code of Criminal Procedure. The High Court after hearing the revision petitioner and the respondent State set aside the order dated 4.3.2009 passed by Addl. Chief Judicial Magistrate, Patna City and remanded the matter to the court below for proceeding in accordance with law treating the protest-cum-complaint petition as a complaint. Accused No.4

mentioned in the First Information Report Bal Manohar Jalan has challenged the said order of the High Court in this appeal.

4. This Court issued notice in the matter on 1.8.2011 besides granting stay of the impugned order. Respondent No.1 herein namely, the revision petitioner before the High Court, though served did not choose to appear either in person or through counsel before this Court and that necessitated us to appoint Mr. S.B. Upadhyay, Senior Advocate as Amicus Curiae for respondent No.1 to assist the Court, by order dated 7.4.2014 and both sides were heard on 2.5.2014.

5. The main contention of the learned counsel for the appellant is that though Section 401(2) of the Criminal Procedure Code stipulated that no order in exercise of the power to revision shall be made by the High Court to the prejudice of the accused unless he had an opportunity of being heard either personally or by pleader in his own defence, the High Court in criminal revision did not issue notice to the appellant herein who is accused No.4 in the First Information Report and without providing an opportunity to him has exercised jurisdiction under Section 401 by directing to proceed in accordance with law treating the protest petition as the complaint, to the prejudice of the appellant herein and hence the impugned order of the High Court is liable to be set aside. In support of his submission he relied on the decision of this Court in *Manharibhai Muljibhai Kakadia and another vs. Shaileshbhai Mohanbhai Patel and others* [(2012) 10 SCC 517]. We also heard the learned amicus curiae on the submissions made by the learned counsel for the appellant.

6. Admittedly the appellant herein is mentioned as accused No.4 in First Information Report No.96 of 2003 dated 28.5.2003. The father of respondent No.1 herein, while alive filed a protest-cum-complaint petition dated 7.6.2003 in the said case and on the filing of the final report, cognizance was taken by the Addl. Chief Judicial Magistrate against accused No.1 Sunita Devi alone for the alleged offences under Section 328

A and 302 IPC and the other four accused mentioned in the First Information Report were discharged from the case and the protest-cum-complaint petition was also rejected by order dated 4.3.2009. Since by then, the complainant was not alive, his another son namely Sunil Paswan preferred the Criminal Revision under Section 397 and 401 of the Criminal Procedure Code and the High Court without issuing notice to the concerned accused passed the impugned order and on the ground of non-compliance of the provision under Section 401 clause (2) of the Criminal Procedure Code resulting in prejudice, the appellant has preferred this appeal.

7. The right of hearing given to accused under Section 401 clause (2) of Criminal Procedure Code was elaborately dealt with by this Court in *Manharibhai Muljibhai Kakadia* case (supra) and it is laid down as follows:

"46. The legal position is fairly well-settled that in the proceedings u/s. 202 of the code the accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of law, upto the stage of issuance of process, the accused cannot claim any right of hearing. S. 202 contemplates postponement of issue of process where the Magistrate is of an opinion that further inquiry into the complaint either by himself is required and he proceeds with the further inquiry 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. If the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint u/s. 203 of the Code, the question is whether a person accused of crime in the complaint can claim right of hearing in a revision application preferred by the complainant against the order of the dismissal of the complaint. Parliament being alive to the legal position that the accused/suspects are not entitled to be heard at

any stage of the proceedings until issuance of process under Section 204, yet in Section 401(2) of the Code provided that no order in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or the other person unless he had an opportunity of being heard either personally or by pleader in his own defence.

47. xxxx xxxx xxxx

48. In a case where the complaint has been dismissed by the Magistrate u/s. 203 of the Code either at the stage of S. 200 itself or on completion of inquiry by the Magistrate u/s. 202 or on receipt of the report from the police or from any person to whom the direction was issued by the Magistrate to investigate into the allegations in the complaint, the effect of such dismissal is termination of complaint proceedings. On a plain reading of sub-s. (2) of Section 401, it cannot be said that the person against whom the allegations of having committed the offence have been made in the complaint and the complaint has been dismissed by the Magistrate under Section 203, has no right to be heard because no process has been issued. The dismissal of complaint by the Magistrate u/s. 203 although it is at preliminary stage nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed the crime. Once a challenge is laid to such order at the instance of the complainant in a revision petition before the High Court or the Sessions Judge, by virtue of S. 401(2) of the Code the suspects get the right of hearing before the revisional court although such order was passed without their participation. The right given to "accused" or "the other person" under S. 401(2) of being heard before the revisional court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under Sections 200, 202, 203 and 204. In the

A revision petition before the High Court or the Sessions Judge at the instance of the complainant challenging the order of dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of the express provision contained in S. 401(2) of the Code. The stage is not important whether it is pre-process stage or post process stage."

8. In the present case challenge is laid to order dated 4.3.2009 at the instance of the complainant in the revision petition before the High Court and by virtue of Section 401(2) of the Code, the accused mentioned in the First Information Report get the right of hearing before the revisional court although the impugned order therein was passed without their participation. The appellant who is an accused person cannot be deprived of hearing on the face of the express provision contained in Section 401(2) of the Code and on this ground, the impugned order of the High Court is liable to be set aside and the matter has to be remitted.

9. Though other grounds such as charge-sheet having been filed and the cognizance has been taken against accused No.1, the protest petition cannot be treated as a complaint warranting an independent inquiry, have been raised in this appeal, we do not deem it necessary to consider the same since we are remitting the matter for fresh consideration and it is open to the appellant to raise them before the High Court.

10. In the result the impugned order of the High Court dated 18.4.2011 is set aside and the matter is remitted and the High Court shall issue notice to all the concerned accused and thereafter hear and dispose of the criminal revision petition in accordance with law. This appeal is allowed accordingly.