Subramanium Sethuraman vs State Of Maharashtra & Anr on 17 September, 2004

Equivalent citations: AIR 2004 SUPREME COURT 4711, 2004 (13) SCC 324, 2004 AIR SCW 5326, 2004 (4) LRI 461, 2004 (7) ACE 379, 2004 (7) SCALE 733, 2004 CRI(AP)PR(SC) 682, (2004) 8 JT 220 (SC), 2005 (1) UJ (SC) 55, 2004 ALL MR(CRI) 3469, 2005 (1) CALCRILR 256, 2005 SCC(CRI) 242, 2004 (5) SLT 708, 2004 (10) SRJ 86, 2004 (8) JT 220, 2005 UJ(SC) 1 55, (2004) 4 CTC 613 (SC), (2005) 28 ALLINDCAS 635 (SC), (2005) 1 MPLJ 260, (2005) 1 PAT LJR 74, (2004) 3 PUN LR 720, (2005) 1 RAJ CRI C 87, (2004) 4 RECCRIR 349, (2004) 6 SUPREME 662, (2004) 4 ICC 750, (2004) 7 SCALE 733, (2004) 4 JLJR 234, (2005) 1 GCD 890 (SC), (2005) 51 ALLCRIC 684, (2004) 3 BLJ 611, (2004) 3 CHANDCRIC 138, (2004) 4 ALLCRILR 358, (2004) 4 CRIMES 78, (2005) 3 EASTCRIC 158, (2005) 1 MAH LJ 626, (2004) 4 CURCRIR 32, (2004) 4 BANKCAS 598, (2005) 1 BOMCR(CRI) 189, (2007) 1 NIJ 469, (2004) 3 ALLCRIR 2704, (2004) 23 INDLD 363, 2005 CHANDLR(CIV&CRI) 9, 2005 (1) ALD(CRL) 124, 2004 (2) ANDHLT(CRI) 401 SC, 2004 (4) BOM LR 775, 2004 BOM LR 4 775

Bench: N. Santosh Hegde, S.B.Sinha, Tarun Chatterjee

CASE NO.:
Appeal (crl.) 1253 of 2002

PETITIONER:
Subramanium Sethuraman

RESPONDENT:
State of Maharashtra & Anr.

DATE OF JUDGMENT: 17/09/2004

BENCH:
N. Santosh Hegde, S.B.Sinha & Tarun Chatterjee

JUDGMENT:

J U D G M E N T SANTOSH HEGDE,J.

This appeal is preferred by accused No.4 in Criminal Complaint Case No.2209/S/1997 pending before the Metropolitan Magistrate, 33rd Court at Ballard Pier, Bombay challenging an order made by the High Court of Judicature at Bombay in a revision petition filed by the 2nd respondent herein whereby the High Court allowed the revision petition and set aside the order of discharge made by the trial court.

The facts necessary for the disposal of this appeal are as follows:

The 2nd respondent herein lodged a complaint before the Additional Chief Metropolitan Magistrate for offence punishable under Section 138 of the Negotiable Instruments Act against the appellant herein and four others which included a Company and its Directors. It is not disputed that the appellant herein was one of the Directors of the Company. The complaint in question was filed in December, 1996 and after following the procedure laid down in Chapter XV and XVI of the Code of Criminal Procedure, 1973, the trial court issued summons to the named accused in the complaint. On receipt of the complaint, the 1st accused Company challenged the same before the very same Magistrate on the ground that the Magistrate could not have taken cognizance of the offence because of the defective statutory notice. Therefore, the Company sought for its discharge. The said application came to be rejected. Thereafter, the second application for discharge was filed by the Company on the very same ground which was allowed by the Magistrate following the judgment of this Court in the case of K.M.Mathew vs. State of Kerala & Anr. (1992 (1) SCC 217) which judgment had held that it was open to the Magistrate taking cognizance and issuing process to recall the said process in the event of the summoned accused showing to the court that the issuance of process was legally impermissible. In this process, the Magistrate came to the conclusion that the statutory notice issued by the complainant was not in conformity with the requirement of law.

Aggrieved by the said order of discharge made by the learned Magistrate, the complainant challenged the same by way of a revision petition before the learned Sessions Court on the ground that the learned Magistrate had no power to review his earlier order because of the Bar under Section 362 of the Cr.P.C. The Sessions Court accepted the contention of the appellant and allowed the revision petition without going into the merits of the legality of the statutory notice.

The Company thereafter challenged the said order of the learned Sessions Judge by way of a criminal writ petition filed under Article 227 of the Constitution of India before the High Court of Judicature at Bombay. The High Court by its order dated 20th December, 2000 rejected the said petition on the ground that once the Magistrate records the plea of the accused and the accused pleads not guilty then the Magistrate is bound to take all such evidence as may be produced in support of the prosecution and there is no provision under the Cr.P.C. enabling the Magistrate to recall the process and discharge the accused after recording the plea of the accused. It is to be noted that there is no dispute in regard to the fact that the plea of all the accused was recorded by the Magistrate on 1.11.1999.

The above said order of the High Court dismissing the criminal writ petition was challenged in a special leave petition bearing No. SLP(Crl.) No.429/2001 by the Company before this Court. This Court rejected the SLP summarily on 5.2.2001 by

the following order:

> "Mr.Gopal Subramanian addressed arguments for some time. After noticing the observations made by this Court, he requested for permission to withdraw this SLP without prejudice (to) his contentions (to) be raised at the appropriate stage. We therefore, dismiss this SLP as withdrawn."

After withdrawing the SLP, one would have accepted the accused in the case to co-operate with the trial court in concluding the trial at the earliest but that was not to be. The second round of litigation challenging the issuance of process was then initiated by the present appellant herein who is none other than the Executive Director of the accused-Company which had earlier fought the litigation right up to this Court. In the fresh application filed before the learned Magistrate, the appellant in his turn contended that the statutory notice issued was contrary to law, hence, no cognizance could have been taken by the learned Magistrate nor the process could have been issued. This application was filed within 10 days after the rejection of the above said SLP by this Court. A perusal of the averments made in the application for discharge by the appellant in the second round of litigation shows that the said application was also on the same grounds as was taken by the Company when it filed the application for discharge. Surprisingly, this application of the appellant came to be allowed by the Magistrate holding the statutory notice issued prior to filing of the complaint was not in accordance with law and in view of the judgment of this Court in the case of K.M.Mathew vs. State of Kerala & Anr. (1992 (1) SCC 217) it was open to him to recall the order of issuance of process. In that process, he allowed the application of the appellant for discharge.

Being aggrieved by the said order of the learned Magistrate, the complainant filed a criminal revision petition before the High Court of Judicature at Bombay which by the impugned order reiterated its earlier view that it was not open to the Magistrate to order the discharge of an accused once his plea has been recorded and on that basis it allowed the revision petition of the complainant keeping open the question of validity of the statutory notice to be raised at the trial.

It is against the said order of the High Court, the appellant is before us in this appeal.

It is to be noted that when this matter came up for preliminary hearing by an order dated 6th September, 2002, this Court observed that the decision rendered in K.M.Mathew's case (supra) may require reconsideration, therefore, this appeal was referred to a Bench of 3-Judges. At this stage itself, it may be relevant to mention that the correctness of the judgment in K.M.Mathew's case (supra) came up for consideration before a 3- Judge Bench of this Court in another case of Adalat Prasad vs. Rooplal Jindal & Ors. (2004 (7) Scale 137). In the said case of Adalat Prasad (supra), a 3-Judge Bench did not agree with the law laid down by this Court in K.M.Mathew's case.

Shri Ranjit Kumar, learned senior counsel appearing for the appellant firstly contended that principles laid down by this Court in Adalat Prasad's case (supra) may require reconsideration because in Adalat Prasad's case this Court proceeded on the basis that the same was a summons case but in reality it was a warrant case covered by Chapter XIX of the Code. He nextly contended that the High Court in this case erred in coming to the conclusion that once the plea of the accused is

recorded the Trial Court did have the jurisdiction to entertain an application for discharge in a summons case. He submitted since very foundation of the complaint being based on an illegal statutory notice, the Trial Court could not have taken cognizance of the offence and issued summons and having erroneously done so it had the power to recall the summons and or entertain an application for discharge of an accused person. He also contended the fact that Company's petition for discharge has been rejected right up to this Court did take away appellant's right to separately agitate his grievance. Shri Chinmay Khaladhar, learned counsel appearing for the respondent contended that though the case considered by this Court in Adalat Prasad's case involved an offence which was triable as a warrant case, this Court actually considered the power of the criminal courts to recall its earlier orders bearing in mind the prohibition contained in Section 362 of the Code. He also submitted the fact that in Adalat Prasad's case involved a warrant case and in K.M.Mathew's case involved a summons case did not make any difference, so far as the correctness of law considered by this Court in Adalat Prasad's case. He also submitted that the appeal in hand being one triable as a summons case, the Code has not contemplated a stage of discharge and once the plea of not guilty is recorded the appellant has to face a trial as contemplated in Chapter XX of the Code. He pointed out the appellant being one of the Directors of the accused company and a co-accused, is using dilatory tactics to delay the trial in spite of the fact the core issue involved in this case has already been decided by this Court in the earlier S.L.P. filed by the company.

Having considered the argument of the learned counsel for the parties, we are of the opinion that the argument of the learned counsel for the appellant that the decision of this Court in Adalat Prasad's case requires reconsideration cannot be accepted. It is true that the case of Adalat Prasad pertained to a warrant case whereas in Mathew's case the same pertained to a summons case. To this extent, there is some difference in the two cases, but that does not, in any manner, make the law laid down by this Court in Adalat Prasad's case a bad law. .

In Mathew's case this Court held that consequent to a process issued under Section 204 by the concerned Magistrate it is open to the accused to enter appearance and satisfy the court that there is no allegation in the complaint involving the accused in the commission of the crime. In such situation, this Court held that it is open to the Magistrate to recall the process issued against the accused. This Court also noticed the fact that the Code did not provide for any such procedure for recalling the process. But supported its reasoning by holding for such an act of judicial discretion no specific provision is required.

In Adalat Prasad's case, this court considered the said view of the court in K.M.Mathew's case and held that the issuance of process under Section 204 is a preliminary step in the stage of trial contemplated in Chapter XX of the Code. Such an order made at a preliminary stage being an interlocutory order, same cannot be reviewed or reconsidered by the Magistrate, there being no provision under the code for review of an order by the same Court. Hence, it is impermissible for the Magistrate to reconsider his decision to issue process in the absence of any specific provision to recall such order. In that line of reasoning this Court in Adalat Prasad's case held :

> "Therefore, we are of the opinion that the view of this Court in Mathew's case (supra) that no specific provision is required for recalling and issuance order amounting to

one without jurisdiction, does not laid down the correct law".

From the above, it is clear that the larger Bench of this Court in Adalat Prasad's case did not accept the correctness of the law laid down by this Court in K.M.Mathew's case. Therefore, reliance on K.M.Mathew's case by the learned counsel appearing for the appellant cannot be accepted nor can the argument that Adalat Prasad's case requires reconsideration be accepted. The next challenge of the learned counsel for the appellant made to the finding of the High Court that once a plea is recorded in a summons case it is not open to the accused person to seek a discharge cannot also be accepted. The case involving a summons case is covered by Chapter XX of the Code which does not contemplates a stage of discharge like Section 239 which provides for a discharge in a warrant case. Therefore, in our opinion the High Court was correct in coming to the conclusion once the plea of the accused is recorded under Section 252 of the Code the procedure contemplated under Chapter XX has to be followed which is to take the trial to its logical conclusion. As observed by us in Adalat Prasad's case the only remedy available to an aggrieved accused to challenge an order in an interlocutory stage is the extraordinary remedy under Section 482 of the Code and not by way of an application to recall the summons or to seek discharge which is not contemplated in the trial of a summons case.

The learned counsel for the appellant then sought leave of this Court to approach the High Court by way of 482 petition questioning the issuance of process by the Magistrate. The same was very strongly opposed by the learned counsel for the respondents who contended that the complaint in this case was filed as far back as 24th of December, 1996 and though there was a direction earlier for an early disposal of the trial, appellant and the other accused have successfully managed to keep the trial in abeyance by initiating one proceeding after the another even up to this Court. He submitted both this Court as well as the High Court in the earlier proceedings has left the question of validity of statutory notice to be considered at the trial but the accused persons including the appellant herein are time and again raising the same issue with a view to delay the trial, hence no such permission as sought for by the appellant should be granted. We see that this Court while dismissing earlier S.L.P. as withdrawn had left the question of legality of the notice open to be decided at the trial. Therefore, legitimately the appellant should raise this issue to be decided at the trial. Be that as it may, we cannot prevent an accused person from taking recourse to a remedy which is available in law. In Adalat Prasad's case we have held that for an aggrieved person the only course available to challenge the issuance of process under Section 204 of the Code is by way of a petition under Section 482 of the Code. Hence, while we do not grant any permission to the appellant to file a petition under Section 482, we cannot also deny him the statutory right available to him in law. However, taking into consideration the history of this case, we have no doubt the concerned court entertaining the application will also take into consideration the objections i.e. raised by the respondent in this case as to delay i.e. being caused by the entertainment of applications and petitions filed by the accused. With the above observations this appeal fails and the same is dismissed.