Punjab-Haryana High Court
Ram Narain vs Bishamber Nath And Anr. on 3 December, 1959
Equivalent citations: AIR 1961 P H 171, 1961 CriLJ 553
Author: I Dua
Bench: I Dua
ORDER I.D. Dua, J.

1. This case has been forwarded to this Court by the learned Sessions Judge, Rohtak, in the following circumstances. Bishamber Nath filed a complaint against Ram Narain and Mst. Jiwani Bai under Sections 497/494, Indian Penal Code, in the Court of Shri D.H. Gupta. Magistrate 1st Class, Rohtak. Ram Narain accused preferred a revision in the Court of the learned Sessions Judge on 14th May 1959 on the ground that the order passed by the Magistrate summoning Ram Narain and his wife Mst. Jiwani Bai was in contravention or Section 204, Criminal Procedure Code, and therefore deserves to be quashed.

The learned Sessions Judge has in his order observed that the learned Magistrate did not comply with the provisions of Section 204, Clauses (1A) and (1B), Criminal Procedure Code, inasmuch ai neither a list of witnesses had been put in by the complainant along with the complaint nor was A copy of the complaint sent by the Court to the accused. The learned Sessions Judge is of the view that the learned Magistrate had not cared to apply his mind to the amendment introduced in Section 204, Criminal Procedure Code, and that he merely proceeded according to the old unamended provsions of the Code of Criminal Procedure. The learned Sessions Judge in support of his view relied on Chaturbhuj v. Naharkhan, AIR 1958 Madh Pra 28.

2. The learned Judge, as already stated, has forwarded the records to this Court with the recommendatiom that the order of the Magistrate dated the 30th April 1959 be set aside and the Magistrate be directed to comply with the provisions of Section 204, Clauses (1A) and (1B) after duly applying his mind to those provisions and then to proceed with the trial of the case in accordance with law. In this Court the accused, the complainant and the State, have all been represented by their respective counsel.

The counsel for the accused has submitted that this order should be set aside because it contravenes the mandatory provisions of law as held in AIR 1958 Madh Pra 28. The counsel for the complainant as well as for the State have submitted that the flaws which have been noticed by the learned Sessions Judge amount to mere irregularities which are curable under Section 537 of the Code of Criminal Procedure. I have checked the record myself and T agree that the learned Magistrate has undoubtedly not cared to notice the latest amendment made in Section 204, Criminal Procedure Code.

The question, however, is as to what order should be passed by this Court at the present stage. The record shows that the complaint in question under Section 497 read with Section 494, Indian Penal Code, also read with Sections 17 and 18 of the Hindu Marriage Act, was instituted by Bishamber Nath sometime in December, 1958. This complaint was not accompanied by any list of witnesses; the statement of the complainant was however, recorded in the Court of the learned Magistrate on

3rd January 1959 and on the same day the Court issued notices under Section 202, Criminal Procedure Code, to the accused persons for 9th January 1959.

On that date proceedings were adjourned because neither the accused had been served nor were the complainant's witnesses present; the case was then again adjourned to 22nd January 1959. On that date the Urdu Chitha shows that the case was adjourned to 5th February 1959; the complainant was present but the witnesses were absent; service was also stated not to have been effected and process-fee was ordered to be paid. But surprisingly enough I also find on the record an application filed in Court on 22nd January 1959 by Mst. Jiwnni Bai through Mr. B. R. Vij Advocate stating that a false complaint had been filed by the complainant against her and her husband and praying for adjournment of the criminal case pending the decision of another civil case involving the same question.

In this application, 27th January 1939 was fixed for hearing. On that date the case was adjourned to 5th February 1959 on account of absence of the counsel for the lady. On 5th February 1959 again the case was postponed to 19th February 1959, on which date the petition by the lady was ordered to be heard along with the other case on 9th March 1959, when again the case was adjourned to 19th March 1959, when a further adjournment was ordered, the next date being 26th March 1959 when the case was ordered to be heard at some other station.

On 19th February 1959, 9th March 1959 and 19th March 1959, the case appears to have been adjourned on the ground that the complainant had not brought his evidence for enquiry under Section 202, Criminal Procedure Code. I have also noticed on the record a certified copy of a plaint dated 2nd January 1959, as also a certified copy of the issues framed by Shri Mohan Lal Jain, Subordinate Judge 1st Class, Rohtak, on 25th February 1959. On 26th March 1959 the case was adjourned to 6th April 1959 for considering the application filed by Mst. Jiwani Bai on 22nd January 1939.

On the adjourned date as the counsel were stated not to be ready for arguments, the case, was again postponed to 14th April 1959, then again to 23rd April 1959 and then to 27th April 1959 and again to 28th April 1959 and, finally, on 30th April 1959 the learned Magistrate passed an order formally summoning the accused persons, apparently without holding any inquiry for which purpose the accused Mst. Jiwani Bai had already been served with a notice. The learned Magistrate felt that public interest demanded criminal justice to be swift and sure and therefore notwithstanding the pendency of the civil snit the present criminal complaint deserved to be proceeded with. For this view he purported to follow M.S. Sheriff v. State of Madras, AIR 1954 SC 397 (399). It may be remembered that several adjournments had been granted by the Court on the ground that the complainant had not brought his preliminary witnesses.

3. The record of this case, as noticed above, clearly discloses a most unsatisfactory and deplorable state of affairs. It appears to me that the learned Magistrate has not cared at all to apply his mind to the circumstances of the case; neither its nature nor its previous history, nor even the orders actually passed on the record have been considered; even the law applicable to the case has not been properly adverted to. After rejecting the application of the lady (or staying the criminal proceedings,

the learned Magistrate just proceeded to summon the accused persons without paying the least attention to the facts and circumstances of the case and even without bearing in mind the Court's own previous orders.

As a matter of fact, while purporting to apply the ratio of the Supreme Court decision in AIR 1954 SC 397 (399), he did not even deem it proper to consider the circumstances of the present case, though the passage from the Supreme Court decision, quoted by him in his order, clearly envisages such consideration; the order does not show if the learned Magistrate made any inquiry as to the stage of the civil suit, in which, according to the order dated the 25th February 1959 framing the issues, 24th April 1959 was the date fixed for the parties' evidence.

4. The revision against the order of the learned Magistrate dated 30th April 1959 was tiled on 14th May 1959 and although the learned Sessions Judge issued notice to the respondent on 15th May 1959, he too did not consider it advisable to stay further proceedings in the Court of the Magistrate, where the list of witnesses was filed by the complainant on 25th May 1959, for 2nd June 1959 which was the date of hearing. The case appears to have been adjourned to 25th June 1959 and the list of witnesses to be summoned for that date was furnished on 6th June 1959; a consolidated list of witnesses without any date containing the names of about 14 witnesses, however, also appears on the record, though its page is not to be found in the index.

5. This brings me to the question which I am called upon to decide, viz. whether Section 204, Criminal Procedure Code, is mandatory and, if so, to what extent. On the examination of the record however I also find it necessary to decide the effect and scope of Section 202, Criminal Procedure Code, and finally I have to determine as to what order should now be passed by this Court as a Court of Revision.

6. In so far as the distinction between directory and mandatory provisions of law is concerned, it is well-settled that the violation of the former usually carries no invalidating consequences unless some prejudice has resulted, while omission to comply with the requirements of the latter results either in complete invalidation of the purported transaction or visits the non-compliance with some clear affirmative legal liabilities. This distinction represents the difference in the intention of the legislature.

It is no doubt true that even the directory | provisions are intended to be obeyed, and not disregarded, nevertheless failure to comply with them is not so serious and fundamental as to be automatically attended with liabilities. On the other hand, mandatory provisions are those, which, on account of their importance, are intended to demand exact compliance. The form of the provision cannot be considered to be conclusive though in the absence of a contrary indication m the context, the use of the word "shall" (except in its future tense) prima facie Suggests imperative intent.

The question is, however, one of the intention of the Parliament, which can be ascertained by considering the whole of the provision, its nature, its object and purpose, its previous history, and the consequences which would flow from construing it one way or the other; it can also be inferred on ground of policy and reasonableness. All these factors influence the interpretation of the

enactment. At this stage two more rules may be stated with advantage.

According to our system of law, provisions in criminal statutes, meant for the protection of the accused persons, are to be considered to be imperative or mandatory, because the laws of this country protect the innocent to the greatest degree, likewise when statutes provide for the doing of acts of for the exercise of power or authority, they are generally assumed to be mandatory or preemptory, irrespective of the phraseology used, though manifest intention of the legislature may replace this assumption.

A direction like the above, If merely intended to guide the officer, in securing order and despatch in the conduct of the official business or proceedings, on which rights of the parties interested cannot be injuriously affected, may be considered to be directory, but not where the mandate in a statute is intended for the protection of the citizen, by a disregard of which, his rights would be injuriously affected.

7. In the light of the above discussion I now proceed to consider the scope and effect of Clauses (1A) and (1B) of Section 204, Criminal Procedure Code. These clauses seem to have been enacted in the interest and for the protection of the accused. They are intended to assure that no person is summoned to stand his trial in Ac dock without the Court first satisfying itself about the witnesses to be produced in support of the prosecution and also to supply the accused with a copy of the complaint against him along with the summonses.

This provision is undoubtedly meant for the protection of the accused person and its disregard I is likely to injuriously affect him. At the same time it may be argued, that merely filing of a list of witnesses before the summonses are issued and attaching a Copy of the complaint with the summonses, are not matters, the disregard of which by themselves, is calculated to seriously prejudice the accused, if a cony of the complaint is supplied to him as soon as be appears in Court and if the required list of witnesses is also actually filed to Court when the accused appears.

It may also be permisible to argue that the language used in Section 204 (1B) is neither negative nor prohibitive nor exclusive. Furthermore, so far as filing a list of witnesses is concerned, being only a time provision, it may be argued to have been intended to be merely directory, as filing of the list just after the issue of processes may not work any serious injury or wrong; in this connection it is relevant to notice that the section does not say that if no list is filed before the accused is summoned, then none can be filed later. Indeed there does not seem to be any legal bar even to the filing of supplementary list of witnesses, though the reliability or trustworthiness of the supplementary witnesses may be open to consideration.

8. The question is undoubtedly not free from difficulty. But, after considering the matter from all its aspects and in all its implications, I am inclined to think, as at present advised, that the provisions of Clause (1B) of Section 204, Criminal Procedure Code, are merely directory in the sense that failure to attach a copy of the complaint with the summonses does not by itself completely invalidate or nullify the issue of the process.

The Court's decision to issue a process cannot be deemed to have been necessarily and automatically invalidated by the omission of the ministerial officers to attach a copy of the complaint with the summonses, and the supply of such a copy to the accused on or before his appearance, though the copy was not attached with the summonses, may cure the defect; at worst, adjournment would, generally speaking, place the accused, for all practical purposes, in the same position as if such a copy had originally accompanied the summonses; Section 537, Criminal Procedure Code, would thus in my opinion, cure the defect.

This, however, does not mean that a Magistrate can with impunity disregard these statutory I directions. He is expected to obey and carry out the provisions of law as much as anyone else is; indeed as a Court of justice his obligation is all the greater to see that law is properly administered; and if an accused has been prejudiced by such an order, it is liable to be set aside. The provisions of Clause (1A), however, appear to me to be mandatory in the sense that a process issued before the filing of the list of witnesses would be invalid.

This clause is couched in a negative language, and it seems to go to the power of the Magistrate to issue summonses or warrants, as the case may be. In coming to this conclusion, I have to a very large extent been influenced by the fact that the laws of our Republic jealously safeguard the liberties of the subject, and the provisions which enjoin the Courts to satisfy themselves about the prima facie nature of a criminal charge, before issuing a process must be intended, in the absence of a clear suggestion to the contrary, to be mandatory.

9. The next question is what order is now called for. It is possible that the accused has by now examined the record of the case and copied out the complaint; the list of witnesses is, of course, on the record now, and it will be open to the Magistrate at this stage, if he is so inclined, to issue a summons attaching with it a copy of the complaint in accordance with the amended provisions of law. It has been observed in some cases that interference on revision is discretionary and, when there is no grave injustice and when the infirmity is only technical, this Court may refuse to interfere; with this view I am in full agreement.

10. At this stage I may also deal with another circumstance which came to my notice while going through the record of die trial Court. As mentioned in an earlier part of this judgment, the Court had called Mst. Jiwani Bai for the purpose of enquiry under Section 202, Criminal Procedure Code, hut it seems to have completely forgotten all about it and the accused were formally summoned immediately after the disposal of the application for staying the criminal proceedings. Section 202, Criminal Procedure Code, may at this stage be set out-

"202. (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance, or which has been transferred to him under Section 192, may, if he thinks fit, for reasons to, be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint;

Provided that, save where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of Section 200.

(2) If any inquiry or investigation under this Section is made by a person not being a Magistrate or a police-officer, such person shall exercise all the powers conferred by this Code on an officer in charge of a police-station, except that he shall not have power to arrest without warrant.

(2A) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.

(3) This section applies also to the police in the towns of Calcutta and Bombay."

It is obvious that for an enquiry under this section presence of the accused is not necessary. Issue of process for compelling the attendance of the person complained against is to be postponed under this section pending an enquiry either by the Magistrate receiving the complaint or in certain circumstances by any other Magistrate subordinate to him or by a police officer or even by such other person as he (the Magistrate) may think fit for ascertaining the truth or falsehood of the complaint.

To summon the accused person, particularly when she happens to be a woman, for the purposes of an enquiry under Section 202, Criminal Procedure Code, seems to me to be rather extraordinary, more so when no reasons are recorded. On the present record it does appear to me that the trial Magistrate has dealt with this case in a manner which does him no credit, and which is apparently calculated to shake the confidence of the citizens of this Republic in the country's Courts of justice. It appears to me that the learned Magistrate did not apply Ms own mind to the case.

The fact that a lady was being proceeded against should have attracted the attention of the Magistrate and impelled him to properly scrutinize the case. Courts of Justice in this country have been given a very privileged position; a position which carries with it corresponding responsibilities; it is therefore incumbent on them to perform their judicial duties with a proper sense of responsibility. Failure on their part to apply their mind to the cases, they are called upon to decide, cannot but create an unhappy impression in this Court. 1 need not pursue this matter any further; suffice it to say that this consideration has weighed with me to a large extent in persuading me to set aside the order of the learned Magistrate on revision.

11. In view of the above discussion, the order of Shri D.R. Gupta, Magistrate 1st Class, Rohtak, dated 30th April 1959, must be quashed and the learned Magistrate be directed to proceed to hold the inquiry under Section 202, Criminal Procedure Code, as ordered by him, in accordance with law and in the light of the observations made above. I may once again point out to the learned Magistrate that it is not only not necessary under the law to call an accused person for enquiry under Section 202, Criminal Procedure Code; but such a procedure would appear to be clearly contrary to the spirit of the law and the purpose of such an enquiry; more so after the recent amendment of the Criminal Procedure Code.

The Court should also bear in mind that we in this Republic are governed by law and not by men, and that the Courts of law and justice, which are constituted for enforcing the rule of law, cannot, from the very nature of things, claim themselves to be above the law: it would indeed be tragic if they were to conduct themselves in a manner which may even tend to give an impression that while exercising their power under the law and while administering and enforcing law, they consider themselves to be above the law.

12. For the reasons given above, I would accept the recommendation of the learned Sessions Judge, quash the order of the learned Magistrate, dated 30th April 1959, and send the case back to the trial Magistrate for further proceedings in accordance with law and in the light of the observations contained in this order.