

## REVISIONAL CRIMINAL

*Before Prem Chand Pandit, J.*OM PARKASH BANSAL,—*Petitioner.**versus*THE STATE,—*Respondent.*

Criminal Revision No. 937 of 1967

June 14, 1968.

*Code of Criminal Procedure (V of 1898)—Ss. 94 and 95—Scope of—Documents in custody of Postal or Telegraph Department—Magistrate—Whether can order their production—Ss. 439 and 537—Magistrate passing order against express provisions of a Statute during trial—Such error—Whether can be remedied by the High Court before the conclusion of the trial.*

*Held*, that under section 94 of the Code of Criminal Procedure, power is given to the Court to issue summons to any persons to produce documents in his possession or power. To this general power, an exception, has been mentioned in section 95 with regard to the documents in the possession of the Postal or Telegraph Department. These documents can be ordered to be produced or delivered only by the District Magistrate, Chief Judicial Magistrate, etc., and not any Magistrate. The Magistrate is only entitled to issue directions for making a search for such documents and then detaining them till he could obtain orders from the District Magistrate, etc. for their delivery or production. He has himself no power to require the Postal or Telegraph authorities to produce or deliver them. That is the jurisdiction of the District Magistrate etc. alone.

[Para 2].

*Held*, that the provisions of S. 537 are generally applied to a case when it is finally disposed of. This section is not intended to apply to a case where the petitioner has approached the High Court immediately after an order contrary to the express provisions of statute. But if the matter is brought to the notice of the High Court under section 439 of the Code and the Court finds that the Magistrate has contravened some provision of the Code, it is only proper that he should be immediately directed to act in accordance with law, rather than allow that error to persist till the entire trial is over and then ask the petitioner to show that by the non-observance of that provision, any prejudice had been caused to him.

[Para 3].

*Petition for revision under section 439 of Criminal Procedure Code against the order of Shri Diali Ram Puri, Sessions Judge, Ferozepore, dated 11th September, 1967 affirming that of Shri N. C. Khichi, Judicial Magistrate 1st Class,*

*Fazilka, dated the 16th August, 1967 ordering for the production of the record in the possession of the Postal Authorities in contravention of sections 94 and 95 of Criminal Procedure Code.*

V. K. RANADE, ADVOCATE, for the Petitioner.

D. C. AHLUWALIA, ADVOCATE, FOR ADVOCATE-GENERAL (PUNJAB), for the Respondent.

### JUDGMENT

PANDIT, J.—During the pendency of a case under section 420 of the Indian Penal Code, against Om Parkash Bansal, petitioner, the Prosecuting Inspector filed an application before the trial Magistrate requiring the production of certain documents which were in the custody of the Post Office, Fazilka, district Ferozepur. Vide his order dated 16th of August, 1967, the learned Magistrate allowed that application and summoned the Post Master, Fazilka, alongwith the said documents. This was presumably done under the provisions of section 95 of the Code of Criminal Procedure. Against this order, Om Parkash Bansal filed a revision petition before the learned Sessions Judge, Ferozepur. He came to the conclusion that although the procedure adopted by the trial Magistrate was irregular, but no interference was called for in the said order, because it had not been shown that any prejudice was caused to the petitioner by that order and the revisional courts did not exist for correction of every error in procedure. Against the order of the learned Sessions Judge, the petitioner has come to this Court in revision under section 439, Criminal Procedure Code.

Section 95 of the Code of Criminal Procedure runs thus:—

- “95. (1) If any document, parcel or thing in such custody is in the opinion of any District Magistrate, Chief Judicial Magistrate, Chief Presidency Magistrate High Court or Court of Sessions, wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, such Magistrate or Court may require the Postal or Telegraph authorities, as the case may be, to deliver such document, parcel or thing to such person as such Magistrate or Court directs.
- (2) If any such document, parcel or thing is, in the opinion of any other Magistrate, or of any Commissioner of Police or

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District Superintendent of Police, wanted for any such purpose, he may require the Postal or Telegraph Department, as the case may be, to cause search to be made for and to detain such document, parcel or thing pending the orders of any such District Magistrate, Chief Judicial Magistrate, Chief Presidency Magistrate or Court.”

(2) From a perusal of this section, it would be apparent that sub-section (1) deals with the powers of a District Magistrate, Chief Judicial Magistrate, Chief Presidency Magistrate, High Court or Court of Session, while sub-section (2) with those of the Magistrate, Commissioner of Police or District Superintendent of Police, in dealing with the documents, parcels or things in the custody of the Postal or Telegraph Department. Under sub-section (1), if the District Magistrate, etc., was of the opinion that any document was required for the purpose of any investigation, inquiry, trial or other proceeding under the Code of Criminal Procedure, he could ask the Postal or Telegraph authorities to deliver such document to any person whom he likes. Under sub-section (2), if any Magistrate was of the opinion that any such document was required for such purpose, he could ask the Postal or Telegraph Department to cause a search being made for the said document and detain it pending the orders of the District Magistrate. It would, therefore, be seen that the power of the Magistrate, while dealing with the document in the custody of the Postal and Telegraph Department, was limited only to the issuing of direction to the Department for making a search for that document and detain it till suitable orders were passed by the District Magistrate, etc., for its delivery or production before any person or the Court. Under section 94 of the Code of Criminal Procedure, power is given to the court to issue summons to any person to produce documents in his possession or power. To this general power, an exception, as it were, has been mentioned in section 95 with regard to the documents in the possession of the Postal or Telegraph Department. Those documents could be ordered to be produced or delivered only by the District Magistrate, Chief Judicial Magistrate, etc., and not any Magistrate. The Magistrate was only entitled to issue directions for making a search for such documents and then detaining them till he could obtain orders from the District Magistrate, etc. for their delivery or production. He has himself no power to require the Postal or Telegraph authorities to produce or deliver them. That is the jurisdiction of the District Magistrate, etc., alone.

(3) In the instant case, it was the trial Magistrate who had summoned the Post Master, Fazilka, with the documents, which were in the custody of the Postal Department. This he could not do under the provisions of section 95 of the Code of Criminal Procedure. His predecessor correctly issued appropriate directions regarding the detention of those documents by the Postal authorities as provided by section 95 (2) of the Code of Criminal Procedure, in anticipation of the orders of the District Magistrate for their production, which might have been obtained on his reference. The learned Sessions Judge has also found that the procedure adopted by the trial Magistrate was irregular. He has, however, refused to interfere with the said order, because according to him, it had not been established that any prejudice had been caused to the petitioner by the passing of the impugned order. While making these observations, it appears that the learned Sessions Judge was thinking of the provisions of section 537 of the Code of Criminal Procedure, according to which no finding, sentence or order passed by a court of competent jurisdiction could be reversed or altered on an appeal or revision on account of any error or irregularity in any order passed during any trial or inquiry or other proceedings under the Code of Criminal Procedure, unless such error or irregularity had in fact occasioned a failure of justice. In my opinion, the learned Sessions Judge had approached the consideration of this case from an erroneous point of view. The provisions of section 537 are generally applied to a case when it is finally disposed of. This section is not intended to apply to a case like the present, where the petitioner has approached this Court immediately after an order contrary to the express provisions of section 95 of the Code of Criminal Procedure had been passed by the trial Magistrate. According to him, the learned Magistrate had committed an illegality in contravening the said provisions. If this court comes to the conclusion that his contention is well-founded and the trial Magistrate, at the very inception of the case, had passed an order which he was not competent to do under section 95 of the Code of Criminal Procedure, this Court, in my opinion, should immediately correct the error and ask the Magistrate to proceed in accordance with the provisions of the statute. A case of this nature should not, in my view, be equated with the one where it was finally over and somebody was complaining that the conviction should be set aside, because the trial Magistrate, during the course of the proceedings, had violated the provisions of certain section of the Code. If this Court finds that the learned Magistrate had contravened some provision of the Code, it is only proper that he should be immediately

directed to act in accordance with law, rather than allow that error to persist till the entire trial was over and then ask the petitioner to show that by the non-observance of that provision, any prejudice had been caused to him and it would be only then that that wrong would be remedied. Besides, it is also desirable that this Court should not be asked, after the entire case was over, to examine that by the contravention of some provisions of law, some prejudice had been caused to the petitioner or not, and then set aside the conviction and order re-trial, if that error had resulted in prejudice to the accused, when the same error could be corrected at the initial stage of the trial, when the petitioner approaches this Court against the impugned order. Such a course would have the additional advantage of directing the Magistrates to try cases strictly in accordance with the provisions of the Code of Criminal Procedure. Even those irregularities, which do not occasion a failure of justice, should not be committed by them.

(4) The view that I have taken is also supported by a Division Bench of the Calcutta High Court in *Nilratan Sen v. Joges Chundra Bhattacharjee* (1), where it was observed—

“... I do not think that section 537 is intended to apply to a case like the present, which has not been finally disposed of. That section provides that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered in revision or appeal by reason of any error, omission or irregularity in certain respects, unless such error, omission or irregularity has occasioned a failure of justice.

The test prescribed for determining whether such error, omission or irregularity should be a ground for setting aside an order is thus one which can be properly applied only after the final result of the case is known. When an objection is taken on the ground of there being a material error, omission or irregularity before a case is finally disposed of, and while there is time to correct the same, it would be unreasonable to hold that section 537 intends the error, omission or irregularity to be allowed to remain

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(1) I.L.R. 23 Cal. 983.

uncorrected. To hold that would be to give to section 537 the effect, not only of curing mere formal defects of procedure when discovered too late, but of practically subverting all procedure."

(5) Similarly in a Full Bench decision of this Court in *Krishan Kumar v. The State* (2), it was said—

"Lest there may be some confusion, I make it clear that nothing said in this judgment shall be constructed as authorising the Courts to commit irregularities which do not occasion a failure of justice. Section 537 of the Code provides that where an irregularity is committed, such an irregularity is, in the absence of failure of justice, not a ground which can be urged in an appeal or revision or in proceedings under section 374 of the Code for the reversal or alteration of the finding, sentence or order passed by a Court of competent jurisdiction. Plainly, S. 537 of the Code cannot be used by the Court of first instance to validate errors or irregularities committed in that Court."

(6) In view of what I have said above, I would accept this petition and set aside the order dated 16th August, 1967, passed by the trial Magistrate only with regard to the summoning of the Post Master, Fazilka, with certain documents which were in the custody of the Postal Department.

R.N.M.

CIVIL MISCELLANEOUS

*Before D. K. Mahajan and Prem Chand Jain, JJ.*

BRIJ LAI,—*Petitioner.*

*versus*

THE CENTRAL GOVERNMENT AND OTHERS,—*Respondents.*

Civil Writ No. 722 of 1963

July 18, 1968

*Displaced Persons (Compensation and Rehabilitation) Rules, 1955—Rule 25—Whether mandatory.*

(2) I.L.R. 1955 Punj. 226=A.I.R. 1955 Pb. 151.