
(2007) 10 OHC CK 0043

In the Orissa High Court

Adimul Hossain Khan and Others

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 12-10-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202
Penal Code, 1860 (IPC) — Section 294, 323, 34, 341, 436

Citation : (2008) CLT 160 (Suppl CrI) : (2008) CriLJ 655 : (2007) 2 OLR 293
Supp

Hon'ble Judges : Pradip Mohanty, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Pradip Mohanty, J.—In this revision, the petitioners challenge the order dated 6-1-2007 passed by the SDJM, Bhadrak taking cognizance of the offence under Sections 436/34, IPC against them in ICC Case No. 104 of 2006 instituted by opposite party No. 2.

2. The allegation of the complainant-opposite party No. 2 is that while he was constructing the boundary wall between his house and that of the petitioners, the petitioners being armed with deadly weapons came and assaulted him. They also assaulted his family members and the labourers engaged for the purpose. Thereafter, the petitioners tried to set fire to the thatched roof of the complainant by pouring kerosene, but the same was extinguished with the help of the fire brigade. It is alleged that on account of such setting of fire, the complainant suffered a loss of Rs. 5000/-. The learned SDJM as it appears from the impugned order, perused the complaint petition, initial statement of the complainant, statements of the witnesses recorded u/s 202, Cr. P.C. Fire Station FIR No. 147 of 2005 dated 24-7-2005, etc. and took cognizance u/s 436/34, IPC. Thereafter, he directed issuance of summons against the petitioners.

3. Mr. Ali, learned Counsel for the petitioners, submitted that on 24-7-2005 opposite party No. 2 had lodged an FIR against the petitioners registered as

Bhadrak Town P.S. Case No. 198 of 2005 under Sections 341/323/436/511, IPC. The said P.S. case corresponds to G. R. Case No. 1184 of 2005 of the Court of SDJM Bhadrak. The Investigating Officer after due investigation submitted charge-sheet against the petitioners under Sections 341/323/294/34, IPC with an endorsement that the allegation with regard to setting of fire to the house of the complainant could not be proved by the witnesses. The learned SDJM having not taken cognizance u/s 436/34, IPC in the aforesaid G.R. Case, should not have taken cognizance of the said offence in the complaint case on the same set of facts. He further submitted that the complainant did not examine himself during enquiry u/s 202, Cr. P.C. Therefore, the cognizance taken by the learned SDJM is bad in law and contrary to the provisions" of law. In support of his contention, he placed reliance on the cases of Prafulla Kumar Samal alias Prafulla Samal v. State of Orissa (2004) 27 OCR 304 : 2004 Cri LJ 311 (Ori) Gopal Krishna Rauta v. State of Orissa (1989) 31 OJD 92 (Criminal), Magi Nayak v. The State of Orissa and Baikunthanath Das (1988) 1 OCR 637, Lakhiram Agrawal v. C.R. Das, Food Inspector, Balangir District (2000) 18 OCR 637, Prasanna Kumar Das alias Prasanna Das v. Sudarsan Sethy (2000) 18 OR 178, Dhaneswar Behera v. State of Orissa (1988) 1 OCR 41, Dibakar Singh v. Birakishore Jarika (2004) 28 OCR 736, Jaladhar Das v. Sridhar Das (1988) 1 OR 466, Rosy and Another Vs. State of Kerala and Others, Kartikeswar Nayak v. Karadl Jagannath (1986) 61 CLT 95 and Gokulananda Mohanty v. Muralidhar Mallik 47 (1979) CLT 244.

4. Mr. Sahoo, learned Counsel for opposite party No. 2 contended that being aggrieved by the conduct of the I.O. in deleting the offence u/s 436, IPC from the charge-sheet, opposite party No. 2 has filed the complaint. After recording of initial statement and enquiry u/s 202, Cr. P.C. the learned SDJM has taken cognizance u/s 436/34 since he found prima facie materials against the petitioners. He further contended that there is no statutory mandate for a Magistrate to direct the complainant to examine himself during enquiry u/s 202, Cr. P.C. The Magistrate is only required to call upon the complainant to produce all his witnesses and examine them on oath. He cannot force the complainant to examine himself. The choice being that of the complainant, he may choose not to examine himself, consequence and effect of which is to be considered during trial. In the instant case, the initial statement of the complainant has been recorded u/s 200, Cr. P.C. During enquiry, six witnesses have been examined by the complainant including the Fire Officer of Bhadrak Fire Station. Therefore, the order taking cognizance cannot be held to be bad in law for non-examination of the complainant himself. In support of his contention, he relied on Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, , Charan Rout and Others Vs. Prafulla Kumar Mangaraj, and Sangram Keshart Mishra v. Niranjan Senapati (2000) 18 OCR 764.

5. Perused the complaint petition and the decisions cited by the parties. It is the settled principle of law that at the stage of issuing process, the Magistrate is not required to enter into detailed discussion about the merits or otherwise of the case and whether or not the allegations in the complaint, if proved, would

ultimately end in conviction of the accused. He should only be satisfied that a prima facie case exists against the accused persons named in the complaint petition. In the instant case, the initial statement of the complainant has been recorded u/s 200, Cr. P.C. During enquiry u/s 202, Cr. P.C. six witnesses have been examined by the complainant including the Fire Officer of Bhadrak fire station (P.W. 6), who has proved the fire report. The choice being that of the complainant, he may or may not examine himself, the consequence of which shall be considered by the Court during trial. The effect of non-examination of a particular witness is a matter, which comes for scrutiny during trial. Similar would be the situation in case of non-examination of the complainant. Under Sub-section (2) of Section 202, Cr. P.C. it is the discretion of the Magistrate whether or not to take evidence of witnesses on oath. Of course, the proviso to this sub-section makes it mandatory for a Magistrate to call upon the complainant to produce all his witnesses and examine them on oath, provided the offence complained of is triable exclusively by the Court of Session. In any case, the choice being that of the complainant whom to examine, the Magistrate cannot compel him to produce a particular witness including himself for examination u/s 202, Cr. P.C. In other words, the Magistrate has no statutory obligation to call upon the complainant to examine himself as a witness. He is only required to call upon the complainant to produce all his witnesses and examine them on oath. The above view has been expressed in *Sangram Keshari Mishra v. Niranjana Senapati* (2000) 18 OCR 764. In the instant case, being aggrieved by the conduct of the I.O. opposite party No. 2 chose to file a complaint case before the SDJM u/s 436/34, IPC and produced six witnesses. The petitioners have not advanced any argument that there is no prima facie material to take cognizance u/s 436/34, IPC. Since the learned Magistrate has been satisfied about existence of prima facie case against the petitioners, it cannot be said that he has committed any illegality or irregularity in taking cognizance. Therefore, this Court is not inclined to interfere with the impugned order passed by the S.D.J.M. Bhadrak.

The revision is accordingly dismissed.