

**(2019) 07 JH CK 0155**

**In the Jharkhand High Court**

**Case No :** Criminal Miscellaneous Petition No. 1716 Of 2010

Ajay Prasad Gupta And Ors

APPELLANT

Vs

State Of Jharkhand And

RESPONDENT

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**Date of Decision :** 09-07-2019

**Acts Referred:**

Indian Penal Code, 1860 — Section 323, 506

Scheduled Caste and Scheduled Tribe (Prevention Of Atrocities) Act, 1989 — Section 3(i)(X)

Code Of Criminal Procedure, 1973 — Section 202(2), 465

**Citation :** (2019) 07 JH CK 0155

**Hon'ble Judges :** Anubha Rawat Choudhary, J

**Bench :** Single Bench

**Advocate :** A. K. Kashyap, Abhilash Kumar, Anurag Kashyap, Shekhar Sinha, Manoj Kumar Sah

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## **Judgement**

1. Heard Mr. A. K. Kashyap, Senior counsel appearing on behalf of the petitioners along with Mr. Abhilash Kumar and Mr. Anurag Kashyap, Advocates.
2. Heard Mr. Shekhar Sinha, counsel appearing on behalf of the Respondent-State.
3. Heard Mr. Manoj Kumar Sah, counsel appearing on behalf of Opposite Party No. 2.
4. This petition has been filed for quashing of the entire Criminal Proceeding including order dated 14.09.2010 passed by Sri R.K. Sinha, learned Judicial Magistrate, 1st Class, Godda in connection with P.C.R. case no. 243 of 2010 and T.R. No. 1456 of 2010 whereby and whereunder cognizance has been taken under Section 323/506 of the Indian Penal Code and Section 3(i)(X) of S.C. and S.T. (Prevention of Atrocities) Act, 1989 and summons have been issued against the petitioners. The case is said to be pending in the court of Sri. R.K. Sinha learned Judicial Magistrate, 1st class, Godda.

5. Counsel for the petitioners submits that although a joint compromise petition has been filed on behalf of the parties, but at the same time he has indicated that the allegations involved in this case relates to Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, and accordingly, he has argued the case on merits also.

6. The counsel has submitted that the impugned order dated 14.09.2010 is fit to be set aside on account of non-compliance of the provisions of Section 202(2) proviso of the Code of Criminal Procedure, 1973. He further submits that as the allegations involved in this case are also under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and the case is exclusively triable by the Court of Sessions, therefore as per the mandate of proviso to Section 202(2) of the Code of Criminal Procedure, 1973, all the witnesses which have been mentioned in the complaint petition were required to be examined on oath before the learned court below and it was incumbent upon the complainant to produce all the witnesses.

7. The counsel for the petitioners further submits that in the instant case, the complainant, instead of producing the witnesses whose names have been mentioned in the complaint petition and also those witnesses whose names have been mentioned in the solemn affirmation of the complainant, has produced other witnesses whose names did not figure either in the complaint petition or in his solemn affirmation. Further there is no compelling circumstances shown by the complainant for non-production of the aforesaid witnesses named in the complaint petition/solemn affirmation. Accordingly, he submits that the impugned order suffers from illegality and the matter is required to be remanded back to the learned court below for fresh consideration, after examining the witnesses whose names have been mentioned in the complaint petition/solemn affirmation of the complainant.

8. The counsel submits that as per the allegations which have been levelled in the complaint petition, the witnesses whose names have been mentioned in the complaint itself, are claimed to be eye-witnesses to the alleged occurrence. He further submits that as per the allegations, the complainant was taken inside the premises and thereafter the entire incident had happened and therefore one of the main ingredients of the provisions of offence under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, is that the incident should occur in 'public view' is totally absent. He submits that so-called eye-witnesses having not been examined by the learned court below, has caused serious prejudice to the petitioners and therefore the impugned order calls for interference by this Court and the matter is fit to be remanded for fresh consideration.

9. He submits that the petitioners have taken due step by filing this case at the earliest possible opportunity. The counsel relies upon judgment passed by Hon'ble Supreme Court reported in (2000) 2 SCC 230 (Rosy and Another vs. State of Kerala and Others).

10. Counsel appearing on behalf of Opposite Party No. 2 does not oppose the submissions on the point of law, which have been advanced by the counsel for the petitioners.

11. Counsel appearing on behalf of Respondent-State also does not dispute the legal position that once the case is triable by the Court of Sessions, the provision of Sections 202(2) proviso are required to be complied and he does not dispute that the witnesses whose names have been mentioned in the complaint petition as well as solemn affirmation of the complainant, have not been produced by the complainant before the learned court below and their non-appearance has caused serious prejudice to the petitioners.

12. After hearing the counsel for the parties and after considering the materials on record, this Court finds that there is no dispute that as per the allegations made in the complaint petition, one of the allegations is regarding offence under the provisions of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and there is no dispute that the alleged offence is triable by a Special Judge equivalent to Sessions Judge.

13. This Court further finds that in the complaint petition, the complainant has mentioned the names of Sunil Kumar and Tarkeshwar Kapri as witnesses to the alleged offence and in the solemn affirmation he has taken the names of Ram Vinay Singh, Sushil Kumar, Rajiv Ranjan Kumar and Mahendra Prasad Gupta as eye-witness and admittedly none of these persons have been examined as witnesses on behalf of the complainant at the stage of enquiry under Section 202(2) of the Code of Criminal Procedure, 1973. This Court further finds that it has been specifically stated in the complaint petition that the witnesses who have been examined in the complaint petition are eye-witnesses to the entire occurrence.

14. In this background, this Court is of the considered view that the witnesses whose names have been mentioned in the complaint petition/ solemn affirmation of the complainant, having not been examined by the learned court below, has caused great prejudice to the petitioners. This Court further finds that the petitioners have taken this point at the earliest possible opportunity which was available to the petitioners by filing the present petition.

15. This Court further finds that the issue involved in this case is squarely covered by the judgment passed by Hon'ble Supreme Court reported in (2000) 2 SCC 230 (Rosy and Another vs. State of Kerala and Others), wherein it has been held in Para Nos. 20 as follows:-

20. Hence, what emerges from the above discussion is:

I. (a) Under Section 200 the Magistrate has the jurisdiction to take cognizance of an offence on the complaint after examining upon oath the complainant and the witnesses present.

(b) When the complaint is made in writing by a public servant acting or

purporting to act in discharge of his official duties, the Magistrate need not examine the complainant and the witnesses.

(c) In such case the court may issue process or dismiss the complaint.

II (a) The Magistrate instead of following the procedure stated above may, if he thinks fit, postpone the issue of process and hold inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the person accused. Such inquiry can be held by him or by the police officer or by any other person authorized by him.

(b) However, where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions, the direction of investigation by the police officer is not permissible and he is required to hold inquiry by himself. During that inquiry he may decide to examine the witnesses on oath. At that stage, the proviso further gives mandatory directions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, which is required to be committed to the Sessions Court for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by the complainant under Section 204(2) before issuance of the process.

(c) The irregularity or non-compliance therewith would not vitiate further proceedings in all cases. A person complaining of such irregularity should raise objection at the earliest stage and he should point out how prejudice is caused or is likely to be caused by not following the proviso. If he fails to raise such objection at the earliest stage, he is precluded from raising such objection later."

16. In the aforesaid judgment passed by Hon'ble Supreme Court, in the partly concurring view, the said judgment has elaborately dealt with the background and interpretation of proviso to Section 202(2) of Code of Criminal Procedure, 1973 has held in Para-47 and 48 as under: -

"47. Thus I have no doubt that the proviso incorporated in sub-section (2) of Section 202 of the Code is not merely to confer a discretion on the Magistrate, but a compelling duty on him to perform in such cases. I wish to add that the Magistrate in such a situation is not obliged to examine witnesses who could not be produced by the complainant when asked to produce such witnesses. Of course if the complainant requires the help of the court to summon such witnesses it is open to the Magistrate to issue such summons, for, there is nothing in the Code which prevents the Magistrate from issuing such summons to the witnesses.

48. I reiterate that if the Magistrate omits to comply with the above requirement that would not, by itself, vitiate the proceedings. If no objection is taken at the earlier stage regarding such omission the court can consider how far such omission would have led to a miscarriage of justice, when such objection is taken

at a later stage. A decision on such belated objection can be taken by bearing in mind the principles adumbrated in Section 465 of the Code."

17. Considering the ratio laid down by the Hon'ble Supreme Court in the aforesaid judgment reported in Hon'ble Supreme Court reported in (2000) 2 SCC 230 (Rosy and Another vs. State of Kerala and Others), this Court is satisfied that non-examination of the witnesses mentioned in the complaint petition/solemn affirmation of the complainant, who are claimed to be eye-witnesses to the alleged offence, has caused serious prejudice to the petitioners and the petitioners have taken steps to challenge the order taking cognizance at the earliest possible opportunity. Accordingly, this Court is of the considered view that the impugned order taking cognizance is fit to be set-aside and the matter is fit to be remanded to the learned court below for further enquiry as per the mandate of Section 202(2) proviso, of the Code of Criminal Procedure, 1973 and pass appropriate order in accordance with law.

18. Accordingly, the order dated 14.09.2010 passed by learned Judicial Magistrate, 1st Class, Godda in connection with P.C.R. Case No. 243 of 2010 and T.R. No. 1456 of 2010, is hereby set-aside and the matter is remitted back to the learned court below for further enquiry as per mandate of Section 202(2) proviso, of the Code of Criminal Procedure, 1973 and pass appropriate order in accordance with law.

19. It is made clear that this Court has not gone into the merits of the allegations and the learned court below is free to proceed as per law.