
(2008) 11 GAU CK 0028
In the Gauhati High Court

Amsar Ali Paramanik and Others

APPELLANT

Vs

State of Assam and Another

RESPONDENT

Date of Decision : 11-11-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156, 156(1), 156(3), 173, 190
Penal Code, 1860 (IPC) — Section 109, 34, 376, 403, 406

Citation : (2009) 5 GLR 74 : (2009) 1 GLT 389

Hon'ble Judges : H.N. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

H.N. Sarma, J.—Inherent jurisdiction of the court u/s 482, Cr.PC is sought to be exercised by filing, this petition by the accused/petitioner challenging the order dated 1.7.2008 in CR Case No. 940c/08 (Corresponding to Kokrajhar PS Case No. 213/08) and GR No. 598/08 registered u/s 376/498A/109/420/403/406/506/511/34.

2. I have heard Mr. A.S. Choudhury, learned senior Counsel for the accused/petitioners and Mr. Kamar, learned PP, Assam and Mr. J.H. Saikia, learned Counsel appearing for the complainant/respondent No. 2.

3. The broad facts leading to filing this petitioner are undisputed and are as follows:

4. The complainant is the wife of the petitioner No. 2 and their marriage took place on 12.2.2008 by executing a Kabinnama under the Muslim Law fixing Dower money of Rs. 30,000. However, after the marriage, her marital life did not pass happily. The accused No. 2/husband of the complainant was raised by the petitioner No. 2 in his house like his younger brother. After marriage, it is alleged that the accused No. 2 who is given status of father by accused No. 1 committed sexual harassment upon the complainant under threat. Being unable to bear the trauma of such harassment committed on her on several occasions, she

protested before the husband but he did not pay any heed rather the accused assaulted her and demanded to bring Rs. 50,000. Her husband, accused petitioner No. 2 demanded the said money for the purpose of living separately in a different house with the complainant. Being unable to bear the harassment and assault she had to leave the matrimonial home and filed the present complaint case in the court of learned CJM, Kokrajhar which was registered as Case No. 940,708 u/s 376/498A/109/420/403/406/506/511/34, IPC.

5. Upon receipt of the complaint, the learned Addl. CJM, Kokrajhar recorded the statement of the complainant and upon perusal of the statement of the complaint petition and her statement vide order dated 1.7.2008, directed that the complaint petition be sent to the O/C, Kokrajhar Police Station for registering a criminal case and for necessary investigation and to submit a report after completion of the investigation. Challenging the aforesaid order, the present revision petition has been filed.

6. It is contended by the learned senior Counsel that the allegations made against the petitioners disclosing an offence u/s 376, IPC which is exclusively triable by a court of Sessions and in such a situation the learned Magistrate was not empowered u/s 202(1)(a) to forward the case to the police for investigation. According to him the case being triable by the Court of Sessions, learned Magistrate was statutorily bound u/s 202(1), Cr.PC to record the statements of the witnesses of the complainant and upon consideration of such statements, if a Sessions triable case is made out he is to commit the same otherwise not. Accordingly, the learned Magistrate is not empowered under the law to cause an investigation by the police in a Sessions triable case instituted on a complainant by a private person in terms of proviso (a) of Section 202(1), Cr.PC.

7. Per contra, Mr. Kamar, learned P.P. submits that the learned Magistrate, in the instant Case, has not taken cognizance of the case and before taking such cognizance, is empowered under the provisions of Section 156(3) read with Sections 190 and 192 of the Cr.PC to pass such order to investigate the case in a Sessions triable case and there is no bar to that effect learned P.P. further submits that the necessity for examination of the witnesses by the learned Magistrate in a case where Sessions triable arises only for the purpose of deciding the issue relating to the postponement of issue and not for any other purpose. Mr. J.H. Saikia, learned Counsel for the complaint/respondent No. 2 has also endorsed the submissions so made by the learned P.P. and contends that the learned trial court has not committed any illegality in passing the impugned order. The following decisions of the Apex Court has been cited at the bar on behalf of the respondents:

1. Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others,
2. Rosy and Another Vs. State of Kerala and Others,
3. Mohd. Yousuf Vs. Smt. Afaq Jahan and Another,

8. I have given my anxious consideration to the rival submissions made by the learned Counsel for the parties.

9. Submissions of the learned Counsel requires examination of the relevant provisions of the Cr.PC more particularly provisions of Sections 156, 190, 192 and 200, Cr.PC as all the aforesaid Sections have got relevance to the issue involved in the present case on the submission so made by the parties.

10. To be precise the issue arises for consideration is as to whether the learned Magistrate is empowered in a sessions triable case instituted by filing a complaint to direct for investigation by the police before taking cognizance u/s 190, Cr.PC.

11. The necessary conditions required for initiation of proceeding and complaints to Magistrate are incorporated in Chapter XIV XV of the Cr.PC respectively. u/s 190, Cr.PC within Chapter XIV, a Magistrate is authorized to take cognizance of an offence upon receiving a complaint of facts which constitute such offence or upon a police report of such facts or upon such instruction received from any person other than a police officer, or upon his own knowledge, that such offence has been committed. Section 192, Cr.PC provides that any Chief Judicial Magistrate after taking cognizance of the offence is entitled to make over the case for enquiry or trial to any competent Magistrate subordinate to him. Section 192(2) provides that any Magistrate of the first class empowered in this behalf by the Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to such other competent Magistrate as the Chief Judicial Magistrate may, by general or special order, specify, and thereupon such Magistrate may hold the inquiry or trial.

12. u/s 200 falling under Chapter XV of the Cr.PC a Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate. However, such examination of complainant is not applicable if a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint or if the Magistrate makes over the case for inquiry or trial to another Magistrate u/s 192. Section 201, Cr.PC provides the procedure to be followed when a Magistrate is not competent to take cognizance of the case. Section 202 Cr.PC provides for postponement of issue of process.

13. u/s 202(1), Cr.PC a Magistrate on receipt of the complaint of offence of which he is authorized to take cognizance or which has been made over to him u/s 192 and if he thinks fit shall in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused, and either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding against such person. The proviso 202(1) lays down that no such

direction for investigation shall be made where it appears to the Magistrate that the offence complained of is triable exclusively by the court of sessions or where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath u/s 200. Sub-section 2 of Section 202 provides that in an inquiry under Sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the court of sessions, he may call upon the complainant to produce all his witnesses and examine them on oath. Section 202(3) provides that if an investigation under Sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in-charge of a police station except the power to arrest without warrant.

14. Chapter XII of the Code provides for information to the police and their powers to investigate. Section 156, falling within Chapter XII of the Cr.PC provides that any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire, into or try under the provisions of Chapter XIII. Sub-section 3 of Section 156 provides that any Magistrate empowered u/s 190 may order such an investigation as referred to in Section 156.

15. A conjoint reading of Sections 190, 192, 200 and 202 of the Cr.PC shows that when a complaint is lodged before a Magistrate he instead of taking cognizance of the offence straightaway, if considers necessary may direct the police for causing necessary investigation of the allegation and as per provision of Section 156(3) the Magistrate himself is empowered to issue such order for investigation. However, the power u/s 156(3), Cr.PC exercisable by a Magistrate is quite different from the power of investigation as provided u/s 202, Cr.PC. Investigation referred to u/s 202 relates to the postponement of the issuance of process after taking of the cognizance of the offence inasmuch as the learned Magistrate issues process only after taking necessary cognizance of the offence.

16. The aforesaid provisions came up for consideration before the Apex Court in the case of Devarapalli Lakshminarayana Reddy (*supra*) wherein the Apex Court held as follows:

The power to order police investigation u/s 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power u/s 156(3), can be invoked by the Magistrate before he takes cognizance of the offence u/s 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3). It may be noted further that an order made under Sub-section (3) of

Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation u/s 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence u/s 156 and ends with a report or chargesheet u/s 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation the Magistrate is empowered u/s 202 to direct within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding". Thus, the object of an investigation u/s 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him.

17. In the instant case, the learned Magistrate on receipt of the complaint being made over to him, examined the complaints u/s 200, Cr.PC and thereafter vide impugned order dated 1.7.2008 forwarded the case for necessary investigation by the police agency. The learned Magistrate passed the impugned order before taking any cognizance of the offences. The provisions of Section 202 having been related only as to whether the process should be issued forthwith or it should be postponed to a later stage for which an enquiry might be caused. Admittedly, the aforesaid order passed by the learned Magistrate pertains to his power as provided u/s 156(3), Cr.PC and although the complainant was examined but cognizance of the offence was not taken till that date by the learned Magistrate and the learned Magistrate has not applied his mind judiciously to the facts alleged in the complaint, rather he preferred to get the matter investigated by the investigating agency. It is noteworthy that the scope and purpose of investigation as referred to u/s 156, Cr.PC is different from that of the investigation mentioned in Section 202, Cr.PC. In the instant case, the learned Magistrate having directed to investigate the case, the police registered the FIR as police case for the purpose of investigation and necessary record.

18. In this connection we may profitably rely on a decision of the Apex Court reported in Mohd Yousuf (*supra*) wherein the Apex Court at paragraphs 8 and 9 has held as follows:

8. The various steps to be adopted for investigation u/s 156 of the Code have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer in-charge of a police station of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that chapter can be commenced by the police even without the order of a Magistrate. But that does not mean that when a Magistrate orders an investigation u/s 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173

of the Code. But the significant point to be noticed is, when a Magistrate orders investigation Under Chapter XII he does so before he takes cognizance of the offence.

9. But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code makes the position clear that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1) i.e.

or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

19. In the case in hand the learned Magistrate exercised the power u/s 156(3) and issued direction to police for causing investigation of the case before taking cognizance, and the complainant was examined only for the purpose of passing the aforesaid order and not for taking such cognizance.

20. In view of the above discussions and on a conjoint reading of the provisions of Sections 156, 190, 200 and 202, Cr.PC, even a case is exclusively triable by a sessions judge instituted on a complaint, the learned Magistrate was competent and empowered to pass an order for causing enquiry by the police which was done before taking cognizance of the offence. But however, after taking cognizance of the offence such power would not be available to the Magistrate.

21. In view of the above discussion, in the instant case, the learned Addl. CJM having exercised his power to direct for investigation of the case before taking cognizance, I do not find any illegality and/or irregularity in the impugned order, and the same was passed within the ambit and parameter of the provision of law, as discussed above.

22. Accordingly, this petition lacks merit and stands dismissed. The interim order dated 23.7.2008 stands vacated.