
(2006) 09 OHC CK 0028

In the Orissa High Court

Case No : Writ Petition (Criminal) No's. 190, 309, 338, 460, 465, 372, 385 and 390 of 2005 and 16, 39, 112, 119, 124, 137, 144, 148, 150, 151, 160, 163, 172, 180, 182, 195, 201, 207, 213, 221, 230, 246, 249, 256, 260, 272, 280, 286, 288, 295, 297, 300, 315, 319, 3

Bansidhar Sahu and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 21-09-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 154(1), 156, 156(3), 157

Citation : (2006) 102 CLT 841 : (2006) 2 OLR 597

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : B.K. Mohapatra, Abhiram Swain, S.C. Mekap, S. Ratho, B. Pujari, Sanjib Ku. Mohanty-2, Deepak R. Sundaray, A.K. Acharya, B. Baug, A.K. Nayak, P.C. Jena, R.K. Nayak, D. Mohanty, B.P. Satpathy, Manoranjan Mishra, Bharati Dash, A.A. Das, B.P. Satpathy, S. Mohanty, A. Tripathy, Alok Jyoti Mohanty, M.K. Khuntia, P.C. Mishra, P.K. Rath-1, S. Das, G. Satpathy, N. Panda, A. Mohanty, B. Baral, A.K. Sahu, D. Nayak, S.C. Palai, D. Dhar, L. Pradhan, S. Ratho, S. Modi, G. Rath, D.R. Mohanty, G. Tripathy, N. Lenka, S. Sanganaria, B.S. Mishra, D.N. Nayak, P.K. Kar, N. Panda, M. Padhi, U.K. Mohanty, G.P. Dutta, S. Mishra, P.K. Mishra, A. Mishra, B. Senapati, A. Swain, R.N. Singh, D.R. Mohapatra, G.K. Behera, G.K. Mohapatra, S.K. Sahu, P.K. Pradhan, M. Basu, M. Kanungo, B.S. Tripathy, Alokjyoti Mohanty, U.K. Mohanty, P.P. Ray and S.K. Swain, for the Appellant; Satyabrata Pradhan, A.S.C., for the Respondent

Judgement

L. Mohapatra, J.—All these criminal writ applications involve common question of law and, therefore they are taken up together. The learned Counsel appearing for the parties in the said cases as well as learned Additional Standing Counsel were heard.

2. The prayer in all the writ applications are different but since they involve a common question, they have been tagged together.

i. in some of the writ applications the grievance is inaction on the part of the

police in registering the F.I.R.

ii. in some of the writ applications the grievance is that even though the F.I.R. has been registered, investigation is not being taken up.

iii. in some of the writ applications the grievance is that though the F.I.R. has been registered, investigation is not being conducted properly.

iv. and in some of the writ applications the prayer is for transfer of investigation to some other agency on the ground of improper investigation.

3. A preliminary objection was raised by the learned Counsel for the State that for the above purposes, writ applications are not maintainable and the informant should approach the Magistrate by way of filing a complaint. In support of such contention, reliance is placed by the learned Counsel for the State on some decisions of the Apex Court. The learned Counsel appearing for the petitioners also relied on a decision of the Apex Court and submitted that under the provisions of the Code of Criminal Procedure, a Police Officer is duty bound to register an F.I.R. if commission of cognizable offence prima facie is made out. When the officer fails to discharge such duty, a writ application can be maintained for the purpose of directing such officer to register the F.I.R. Keeping in mind the submissions made by the learned Counsel for both the parties, the sole question that requires to be examined is as to whether a writ application is maintainable on the allegation of inaction on the part of the police in registering an F.I.R. where commission of cognizable offence is disclosed or an alternative remedy is available to the informant by way of filing a complaint before the concerned Magistrate. In this connection, reliance is placed on a decision of the Apex Court in the case of Gangadhar Janardan Mhatre v. State of Maharashtra and Ors. reported in A.I.R 2004 . SC 5414. The aforesaid case was filed before the Apex Court against the order passed by the Bombay High Court dismissing a Criminal Writ Petition where the prayer had been made to issue a writ of mandamus or any other writ/order/direction to transfer the investigation of a case from the State C.I.D. to any other impartial investigating agency and/or to Senior P.I., Manickpur Police Station, Vasai under the supervision of Superintendent of Police, Thane. The Apex Court in paragraphs 13 and 14 of the judgment observed as follows:

When the information is laid with the Police, but no action in that behalf is taken, the complainant is given power u/s 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint u/s 203 of the Code. In case he finds that the complaint/evidence recorded prima facie

discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in *All India Institute of Medical Sciences Employees' Union (Reg.) through its President v. Union of India and Ors.* (1997) SCC 303. It was specifically observed that a writ petition in such cases is not to be entertained.

The inevitable conclusion is that the High Court's order does not suffer from any infirmity. The writ application was not the proper remedy, and without availing the remedy available under the Code, the appellant could not have approached the High Court by filing a writ application.

4. This decision was again taken note of by the Apex Court in the case of *Hari Singh v. State of U.P.* reported in AIR 2006 SC 3230 and it was held that the writ application is not maintainable and the informant can approach the Magistrate by way of filing a complaint. The learned Counsel for the petitioners however, relied upon another decision of the Apex Court in the case of *Ramesh Kumari Vs. State (N.C.T. of Delhi) and Others*, and submitted that Section 154 of the Code of Criminal Procedure is mandatory and the police officer concerned is duty bound to register the case on receiving information disclosing cognizable offence. When such police officer fails to do such duty, a writ application is maintainable for a direction to such police officer to register the case provided the information discloses cognizable offence. In such event, the question as to whether an alternative remedy is available to the informant or not becomes irrelevant.

5. In the case of *Gangadhar Janardan Mhatre v. State of Maharashtra and Ors.* (Supra), a writ application was filed in Bombay High Court praying for issuance of writ of mandamus directing transfer of investigation of a criminal case from the State C.I.D. to any other impartial investigating agency. The High Court though issued notice before admission, ultimately found that the case was pending before the Sessions Court and, therefore held that there was no question of transfer of the case for investigation to some other agency and, accordingly, dismissed the writ application. Before the Apex Court, the informant made serious allegations about competency and fairness not only against the investigating officers but also against some of the judicial officers. The Apex Court in the judgment discussed the power of a Magistrate in relation to Sections 156(3), 169, 178 and 190 of the Code of Criminal Procedure as well as the powers of the police u/s 173 of the Code and ultimately came to the conclusion as quoted earlier. While deciding thus, the Court placed reliance on an earlier decision of the same Court in the case of *All India Institute of Medical Sciences Employees' Union (Regd.) through its President Vs. Union of India (UOI) and Others*, . The decision in the case of *Gangadhar Janardan Mhatre v. State of Maharashtra and Ors.* (Supra) was followed by the Apex Court in the case *Hari Singh v. State of U.P.* (Supra) and it was held as follows:

(1) 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.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one, which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered u/s 190 may order such an investigation as above-mentioned.

When the information is laid with the police, but no action in that behalf is taken, the complainant can u/s 190 read with Section 200 of the Code lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint u/s 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in All India Institute of Medical Sciences Employees' Union (Regd.) through its President Vs. Union of India (UOI) and Others, . It was specifically observed that a writ petition in such cases is not to be entertained.

6. In the case of Ramesh Kumari v. State (NCT of Delhi) (Supra), the petitioner therein had filed a writ application before the Delhi High Court alleging non-registration of a case by the police pursuant to complaints dated 9.9.1997 and 13.9.97. The allegation in the complaint before the police was that the petitioner was in possession of a piece of land and there was an interim order by the High Court protecting possession of the petitioner on 14.8.1997 and the said order had been extended by a later order dated 10.9.1997, in presence of the other side. However, the respondents before the High Court in the aforesaid case broke open the lock and removed various articles on 9.9.1997 and 10.9.1997. The further grievance of the petitioner was that though she had lodged information before the police, no action was taken even if allegations made in the complaint disclosed the commission of cognizable offence. The Apex Court referring to its earlier decision in the case of State of Haryana v. Bhajan Lal reported in 1992 SCC 426 held that the views expressed by the Apex Court in the paragraphs 31,32 and 33 of the judgment in the case of State Haryana v. Bhajan Lal (Supra) leave no manner of doubt that the provision u/s 154 of the Code of Criminal Procedure is mandatory and the officer concerned is duty bound to register the case on the basis of such information disclosing cognizable offence. Though the High Court had dismissed the writ application on the ground of availability of alternative remedy in paragraph 3 of the judgment, the Court held as follows:

Mr. Vikas Singh, the learned Additional Solicitor General, at the outset, invites

our attention to the counter-affidavit filed by the respondent and submits that pursuant to the aforesaid observation of the High Court the complaint/representation has been subsequently examined by the respondent and found that no genuine case was established. We are not convinced by this submission because the sole grievance of the appellant is that no case has been registered in terms of the mandatory provisions of Section 154(1) of the Criminal Procedure Code. Genuineness or otherwise of the information can only be considered after registration of the case. Genuineness or credibility of the information is not a condition precedent for registration of a case. We are also clearly of the view that the High Court erred in law in dismissing the petition solely on the ground that the contempt petition was pending and the appellant had an alternative remedy. The ground of alternative remedy nor pending of the contempt petition would be no substitute in law not to register a case when a citizen makes a complaint of a cognizable offence against a police officer.

7. In the case of All India Institute of Medical Sciences Employees' Union (Reg.) through its President v. Union of India and Ors. (Supra), the Court dealt with the similar question which has been followed by the same Court in the case of Gangadhar Janardan Mhatre v. State of Maharashtra and Ors. (Supra) as well as in the case Hari Singh v. State of U.P. (Supra). The Court in paragraphs 3 and 4 of the judgment held as follows:

The Code of Criminal Procedure, 1973 (for short the "Code") prescribes the procedure to investigate into the cognizable offences defined under the Code. In respect of cognizable offence Chapter XII of the Code prescribes the procedure: information to the police and their powers to investigate the cognizable offence. Sub-section (1) of Section 154 envisages that "every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf." On such information being received and reduced to writing, the officer in charge of the police station has been empowered u/s 156 to investigate into the cognizable cases. The procedure for investigation has been given u/s 157 of the Code, the details of which are not material. After conducting the investigation prescribed in the manner envisaged in Chapter XII, charge-sheet shall be submitted to the Court having jurisdiction to take cognizance of the offence. Section 173 envisages that: (1) Every investigation under this Chapter shall be completed without unnecessary delay. (2) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report in the form prescribed by the State Government giving details therein. Upon receipt of the report, the Court u/s 190 is empowered to take cognizance of the offence. u/s 173(8), the investigating officer has power to make further investigation into the offence.

When the information is laid with the police but no action in that behalf was taken, the complainant is given power u/s 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to inquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the concerned police to investigate into the offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint u/s 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses offence, he is empowered to take cognizance of the offence, and would issue process to the accused.

8. Though the aforesaid judgment was delivered on 21.2.2006, however, the judgment of the same Court in the case of Gangadhar Janardan Mhatre v. State of Maharashtra and Ors. (Supra) as well as judgment in All India Institute of Medical Sciences Employees' Union. (Reg.) through its President v. Union of India and Ors. were not brought to the notice of the Court. Similarly, though the judgment in the case of Harisingh v. State of U.P. (Supra) was delivered on 16.6.2006, the judgment delivered by the same Court in the case of Ramesh Kumari v. State (NCT of Delhi) (Supra) was not brought to the notice of the Court. It is apparent from the above discussions that conflicting views have been expressed by the two different Benches on this question of law. However, the last decision cited before this Court is the case of Harisingh v. State of U.P. wherein earlier decisions of the Supreme Court have been taken note of and, therefore, the last decision rendered by the Apex Court on this question of law is to be followed.

9. In course of argument of this batch of cases, learned Counsel appearing for the petitioners submitted that certain eventualities had not been taken note of by the Apex Court in the case of Gangadhar Janardan Mhatre v. State of Maharashtra and Ors. (Supra) which has been subsequently followed by the very same Court in the case of Harisingh v. State of U.P. (supra). According to the learned Counsel for the petitioners, there may be cases, such as, theft, dacoity, extortion, kidnapping and abduction where the accused persons are not known and there may be other cases including the case of murder where the accused persons are not known. In such eventualities, a complaint cannot be filed. Another submission made by the learned Counsel for the petitioners is that in cases of kidnapping and abduction, unless investigation is made, abducted or kidnapped persons cannot be recovered in a proceeding based on a complaint case and similarly in cases of theft, dacoity, extortion etc. the stolen articles cannot be directed to be recovered in a complaint case. Learned Counsel for the petitioners also submitted that in a case of murder, there cannot be a direction for conducting post-mortem examination or other examinations, such as, forensic examination etc. I am of the view that the submissions made above have no basis where the accused persons are not known and even in cases, where

recovery of the victim or stolen articles are required to be done, an information can be given to the concerned Magistrate or a complaint can be filed constituting the facts and the nature of offence committed u/s 190 of the Code of Criminal Procedure. In such type of cases, it is not necessary for the Magistrate to proceed under Chapter XV of the Code of Criminal Procedure. When a complaint is filed u/s 190 of the Code of Criminal Procedure, the Magistrate will be duty bound to send it to the police for investigation u/s 156 of the Code of Criminal Procedure on consideration of allegations made therein. Therefore, in cases, where the accused persons are not known, in cases, where the recovery of stolen articles are required to be done, in cases of such nature, where certain things can be done only in course of investigation by the police, a complaint can always be filed u/s 190 of the Code of Criminal Procedure and prayer can be made before the learned Magistrate to send the complaint to the police for investigation u/s 156(3) of the Code of Criminal Procedure. This answers this submissions made by the learned Counsel for the petitioners as indicated earlier.

10. Now coming to the question as to whether a writ application for the aforesaid purpose is maintainable or not as discussed earlier in paragraph-8 of the judgment, the cases of Gangadhar Janardan Mhatre v. State of Maharashtra and Ors. (Supra), and All India Institute of Medical Sciences Employees' Union (Reg.) through its President V. Union of India and Ors. (Supra) were not brought to the notice of the Court when the decision in the case of Ramesh Kumari v. State (NCT of Delhi) (Supra) was taken. Similarly, the case of Ramesh Kumari v. State (NCT of Delhi) (Supra) was not brought to the notice of the Court when the case of Harisingh v. State of U.P. (Supra) was decided. The last case on this issue is the case of Harisingh v. State of U.P. (Supra) which has taken note of earlier decisions taking a similar view and, therefore this being the last decision, should be followed.

It will not be out of place to refer to another decision of the Apex Court in the case of Anandwardhan and Anr. v. Pandurang and Ors. reported in 2006 34 OCR 288 (SC) where the similar view has been taken as that of the case of the Hari Singh v. State of U.P. (Supra).

11. I, accordingly, hold that a writ application on the ground of non-registration of F.I.R. when commission of cognizable offence is disclosed, is not maintainable and the remedy is available by way of filing a complaint before the concerned Magistrate u/s 190 of the Code of Criminal Procedure. I, accordingly hold that all the writ applications where the grievance of the petitioners is that the F.I.R. has not been received or registered, even though it discloses commission of cognizable offence, are not maintainable.

12. The other types of case are the cases where the F.I.R. has been registered but the allegation is that investigation is not being done or investigation is not done properly. In these types of cases, the informant can put forth his grievance before the concerned S.P. before approaching the High Court in a writ of mandamus. I, accordingly direct that in all these cases where the F.I.Rs. have

been registered but the allegation is that investigation has not been done at all or done properly, the informant therein must first approach the concerned Superintendent of Police putting forth his grievances and only when no action is taken, a writ can be filed for proper direction.

So far as prayer for change of investigation agency is concerned, the informant should first approach the concerned Superintendent of Police indicating the reasons for his dissatisfaction and if the Superintendent of Police on perusal of the record is satisfied that investigating officer has not conducted the investigation impartially or properly, he may change the investigating officer and hand over the same to a responsible officer. Even thereafter, if the investigation is not done properly in accordance with law and impartiality is not maintained, the informant can always approach this Court in a writ application for change of the investigating agency.

13. These writ applications are disposed of with the aforesaid observations and directions.