
(2009) 12 OHC CK 0027
In the Orissa High Court

Golap Manjari Mallick and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 17-12-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190, 482
Dowry Prohibition Act, 1961 — Section 4

Citation : (2010) CLT 541 (Suppl CrI) : (2010) 1 OLR 248 : (2011) 6
RCR(Criminal) 1666

Hon'ble Judges : I. Mohanty, J

Bench : Single Bench

Judgement

I. Mohanty, J.—Heard Mr. L. Mishra, learned Counsel for the petitioner, Mr. M.B. Das, learned Counsel for the informant and Mr. Mishra, learned Addl. Government Advocate for the State.

2. The petitioner have filed the present application u/s 482 Cr.P.C. challenging the order of cognizance dated 30.7.2008 passed by the learned J.M.F.C., Jajpur Road in G.R. Case No. 257 of 2008 for offences under Sections 498-A/323/307/506/34 I.P.C. read with Section 4 of D.P. Act against the accused persons, namely, Nandakishore Mallick " Dillip " Pagala and Mohan Charan Mallick, simultaneously also directed issue of N.B.Ws. against Golap Manjari Mallick, Dharitri Mallick, Gayatri Mallick and Pratap Kumar Parida.

3. The four persons named hereinabove against whom, no charge-sheet was submitted, have filed the present application with a prayer to quash the order of cognizance, inter alia, on the ground that the Magistrate did not have the necessary jurisdiction to direct issue of process against the persons who have not been charge-sheeted by the police.

4. Learned Counsel for the petitioners submits that although the Petitioner Nos. 1, 2 and 3 have been named in the F.I.R. but no charge-sheet was filed against them, on the conclusion of the investigation, petitioner No. 4-Pratap Kumar Parida was not named in the F.I.R. itself.

5. In this respect, reliance was placed by the learned Counsel for the petitioners on a judgment of the Hon''ble Supreme Court in the case of Kishori Singh and Ors. v. State of Bihar and Anr. (2000) 19 OCR (SC) 647.

6. Sri Das, learned Counsel for the informant submits that although the Hon''ble Supreme Court in the aforesaid judgment took note of the case of India Carat Pvt. Ltd. Vs. State of Karnataka and Another, , yet the Hon''ble Supreme court did not deal with the said judgment and instead, placed reliance on the judgment of the Hon''ble Supreme Court in the case of Raj Kishore Prasad Vs. State of Bihar and another, as well as the case of the Hon''ble Apex Court in the case of Ranjit Singh Vs. State of Punjab, .

7. It is further submitted that the Hon''ble Supreme Court in the case of Kishori Singh and others (supra) placed reliance in the case of Raj Kishore Prasad (supra) proceeded to hold that the Magistrate could not have issued process against those persons who may have been named in the F.I.R. as accused persons, but not charge-sheeted in the charge-sheet that was filed by the police u/s 173 of Cr.P.C.

8. Sri Das placed reliance on the judgment of the Hon''ble Supreme Court in the case of M/s. India Carat Pvt. Ltd. (supra) and in particular, the finding of the Hon''ble Court in Paragraph-16 thereof is quoted below:

16. The position is, therefore now well settled that upon receipt of a police report u/s 173(2) a Magistrate is entitled to take cognizance of an offence u/s 190 (1) (b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer given an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit; in exercise of his powers u/s 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case u/s 190(1)(a) though it is open to him to act u/s 200 or Section 202 also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him.

9. Apart from the above, Sri Das also placed reliance on the judgment of the Hon''ble Supreme Court in the case of Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, and the relevant portion is quoted hereinbelow:

It is true that in coming to a decision as to whether a process would be issued

the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a prima facie case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for the High Court or even this Court to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations, in our opinion, are totally foreign to the scope and ambit of an enquiry u/s 202 of the Code of Criminal Procedure.

10. Considering the aforesaid judgments and the case laws referred hereinabove, admittedly, in the present case, the stage of Section 193 of Cr.P.C. has not yet arrived. The learned J.M.F.C. in exercise of power u/s 190 of Cr.P.C. has proceeded to take cognizance of the offences against Petitioner Nos. 1, 2 and 3 who are named in the F.I.R. as well as Petitioner No. 4 though not named in the F.I.R., on the basis of recording a finding that on scrutiny of the materials placed before the Court by police on a conclusion of the investigation, he found prima facie case under Sections 498-A/323/307/506/34 I.P.C. read with Section 4 of D.P. Act against the petitioners.

11. Therefore, I am of the considered view that the judgment of the Hon''ble Supreme Court in the case of Kishori Singh and Ors. (supra) is not attracted to the facts of the present case and further, since the Magistrate has been vested with an undoubted discretion in the matter and the said discretion having been judicially exercised by him, it is not for the High Court to substitute its own discretion for that of the Magistrate.

12. Learned Counsel for the petitioner states that the N.B.Ws. have been issued against the petitioners and the same have not been executed in view of the interim order passed by this Court vide order dated 27.8.2008 passed in Misc.Case No. 1446 of 2008 and prays that the petitioners may be released on bail.

13. Considering the aforesaid submissions while dismissing the present application u/s 482 Cr.P.C. being devoid of any merit, as well as vacating the interim order, I direct that if the petitioners surrender before the learned J.M.F.C, Jajpur Road in G.R. Case No. 257 of 2008 within a period of ten days from today and move for bail, they shall be released on bail on such term sand conditions as would be fixed by the said court.

14. The CRLMC is disposed of.

15. Urgent certified copy of this order be granted on proper application.