
(2013) 09 OHC CK 0026
In the Orissa High Court
Case No : CRLMC No. 167 of 2002

Kamalakanta Modi and Another	Vs	APPELLANT
State of Orissa and Others		RESPONDENT

Date of Decision : 27-09-2013

Acts Referred:

Citation : (2014) 1 Crimes 410 : (2014) 1 ILR (Ori) 363 : (2014) 1 OLR 165

Hon'ble Judges : B.R. Sarangi, J

Bench : Single Bench

Advocate : K.K. Jena, A.K. Biswal and A.K. Behera, for the Appellant;
Zafarullah, A.S.C. for Opp. Party No. 1, for the Respondent

Judgement

Dr. B.R. Sarangi, J.—This CRLMC has been directed against the order dated 17.5.2002 passed by the learned Ad hoc Addl. District &

Sessions Judge, Balasore in Criminal Revision No. 70/2001 of 6/1998 confirming the order dated 5.1.1998 passed by the learned S.D.J.M.,

Balasore in I.C.C. Case No. 113 of 1997 in which cognizance of offence under Sections 363/376/109, IPC was taken. The short fact is that on

19.5.1996, Bhanja Parmanik, the father of the victim Sanjulata Paramanik lodged an FIR before the Town P.S., Balasore that while his daughter

Sanjulata Parmanik, aged about 15 years was returning home from Tentulia Thakurani after performing puja on 18.5.1996, on the way near

Chandmari Padia, accused Sanjay Kumar Behera kidnapped her in a Tempo and confined her in the house of late Kailash Modi. While his

relative's tried to rescue her from there, the father of the accused, Narahari Behera alias Chila did not allow them to come and quarrelled with

them. After receiving the FIR, police registered P.S. Case No. 166 of 1996 against Sanjay Kumar Behera only under Sections 363/366 and

arrested him and sent him to the Court of the learned S.D.J.M., Balasore and G.R. Case No. 595 of 1996 was registered. After investigation,

police submitted charge-sheet against accused Sanjay Kumar Behera under Sections 363/366, IPC for which S.T. Case No. 63 of 1997 is sub

judice before the Asst. Sessions Judge-cum-C.J.M., Balasore.

When the matter was sub judice , accused Sanjay Kumar Behera, Narahari Behera, Kamalakant Modi, Kartick Chandra Das, Balai Chandra Das

and the victim Sanjulata Parmanik were arrested by the police personnel of Kotwali P.S., Midnapur on 2.6.1996 and were produced before the

learned S.D.J.M., Midnapur. On interrogation, the victim Sanjulata Parmanik stated that she was 19 years old and married to Sanjay Kumar

Behera and on such statement, all the accused persons were released on bail by the learned S.D.J.M., Midnapur. Even before this Court in

Criminal Misc. Case No. 1872 of 1996, the victim Sanjulata Parmanik filed an affidavit describing her as wife of Sanjay Kumar Behera as she was

major and she also filed an affidavit, before the learned S.D.J.M., Balasore stating the same fact and wanted to be examined u/s 164 Cr.P.C. but

she could not attend the Court due to some unavoidable reasons. After the victim girl Sanjulata Parmanik was produced before the learned

S.D.J.M., Balasore, she was given to the custody of her father. After four months she filed the complaint against the petitioners describing them as

accused persons before the learned S.D.J.M., Balasore which was registered as I.C.C. Case No. 113 of 1997 alleging that she has been raped by

accused Sanjay Kumar Behera and Chila alias Narahari Behera. The learned S.D.J.M., Balasore recorded the statement of the victim girl u/s 200

Cr.P.C. and proceeded with the enquiry u/s 202 Cr.P.C. In course of enquiry, three witnesses, i.e., the parent's of the victim and one Raghunath

Panigrahi were produced. Though the complaint petition reveals a number of witnesses including the police officers, who had investigated the G.R.

Case, after examination of the aforesaid three witnesses, the complainant filed a memo that she would not adduce any more witness during enquiry;

even the complainant herself has not been examined u/s 202 Cr.P.C. Before taking cognizance, learned S.D.J.M., Balasore called for police

papers from the Court of the learned Asst. Sessions Judge-cum-C.J.M., Balasore in S.T. Case No. 19/63 of 1997 vide order dated 4.11.1997,

but the latter did not spare the aforesaid case record. Therefore, the learned S.D.J.M., Balasore could not get opportunity to peruse the G.R.

Case records. However, on the basis of the initial statement of the victim recorded u/s 200 Cr.P.C. and enquiry conducted u/s 202 Cr.P.C., the

learned Magistrate took cognizance of the offence under Sections 363/366/376, IPC against all the accused persons in I.C.C. Case No. 113 of

1997. Kamala Kanta Modi and Balai Chandra Das challenged the said order of taking cognizance before the learned District and Sessions Judge,

Balasore in Criminal Revision No. 70/01 of 6/98 on the following grounds:

(i) The complainant did not examine all the witnesses including herself at the time of enquiry u/s 202 Cr.P.C.

(ii) The memo filed by the complainant is not as per law and the memo reveals that the complainant does not want to produce any more witness at

the time of enquiry. Since there are prevaricating statements of the complainant in connection with this case, her examination was necessary at the

time of examination by the Court.

(iii) Since police had already investigated into the same case and submitted final report against these petitioners, the learned Court below should

have perused the police papers before taking cognizance.

2. Learned Ad hoc Addl. Sessions Judge, Balasore by order dated 17.5.2002 confirmed the order of taking cognizance dated 5.1.1998 passed

by the learned S.D.J.M., Balasore against the petitioners accepting the memo of complainant declining to examine the remaining witnesses after

perusing her initial statement and statement recorded u/s 202 Cr.P.C.

3. Mr. K.K. Jena, learned counsel appearing for the petitioners vehemently urged that the learned S.D.J.M., Balasore vide order dated 7.4.1997

had already taken cognizance before conducting enquiry u/s 202 Cr.P.C., which is contrary to the provisions of law. He further submitted that

while taking cognizance, the statement of the victim has neither been recorded nor all the witnesses named in the complaint petition have been

examined. Therefore, the order taking cognizance is bad in law as the procedure envisaged in a Sessions triable case u/s 202 Cr.P.C. has not been

followed thereby, it vitiates the entire proceeding. He further urged that the learned S.D.J.M., Balasore even though called for the records in G.R.

Case, without perusing the same has taken the cognizance in I.C.C. Case.

Consequently the order of taking cognizance in I.C.C. Case is misconceived one and the same is liable to be quashed.

To substantiate his contention he relied upon the judgment in Fakir Singh Vs. Bijaya Kumar Bagaria, in which the case of Nira @ Niranjan

Mohanty Vs. Narayan Padhan and Others, has been relied upon where it is held that before taking cognizance, the Magistrate has to conduct

enquiry u/s 202 Cr.P.C. and thereafter proceed with the matter. He has also relied upon the judgments in Gokulananda Mohanty and Others Vs.

Muralidhar Mallik, Kartikeswar Nayak Vs. Karadi Jagannath and Others, Magi Nayak and Others Vs. The State of Orissa and Baikunthanath

Das, Dhaneswar Behera and others v. State of Orissa and others, (1988) 1 OCR 41, Gopal Krishna Rout and others v. State of Orissa and

another, (1989) 2 OCR 128 and Kailash alias Kelu Jena and others v. Rama Chandra Majhi, (1989) 2 OCR 665 and stated that the proceeding

is vitiated due to non-compliance of the provisions contained u/s 202 Cr.P.C. by not examining the complainant as well as the witnesses stated by

her.

4. Mr. Zafarulla, learned Addl. Standing Counsel appearing for the State vehemently opposed the contention raised by the learned counsel for the

petitioners stated that the learned S.D.J.M., Balasore is justified in taking cognizance for the aforesaid offences against the petitioners in I.C.C.

Case No. 113 of 1997, which has been confirmed by the learned Ad hoc Addl. Sessions Judge, Balasore in Criminal Revision No. 70/2001 of

6/1998. He further stated that neither the order of taking cognizance nor the revisional order suffers from any infirmity or illegality, which needs to

be interfered with by this Court invoking the jurisdiction u/s 482 Cr.P.C.

5. On examination of the contention raised by the learned counsel for the petitioners, it is found that by order dated 7.4.1997, learned S.D.J.M.,

Balasore in I.C.C. Case No. 113 of 1997 has not taken cognizance of any offence but has only stated that the complaint alleged makes out a

cognizable offence and directed for enquiry u/s 202 Cr.P.C. in view of such position, the contention raised by Mr. Jena, learned counsel for the

petitioners that by order dated 7.4.1997 the learned Magistrate took cognizance of offence is absolutely misconceived one and the same is not

correct and is hereby rejected.

As regards the contention raised that the proceeding initiated against the accused persons in ICC Case No. 113 of 1997 is not sustainable in view

of non-compliance of the provisions contained u/s 202 Cr.P.C., which is a Sessions triable case by not examining all the witnesses named in the

complaint petition including the complainant herself, it is found in the record that in 202 Cr.P.C. enquiry conducted by the learned S.D.J.M.,

Balasore, the complainant examined three witnesses and filed a memo that she would not adduce any more evidence during the enquiry and the

complainant herself had not been examined under 202 Cr.P.C. But the learned S.D.J.M., Balasore considering her initial statement and the

evidence of other witnesses, namely, her parents and one Raghunath Panigrahi, took cognizance which ipso facto cannot be said that it has

invalidated the order of taking cognizance.

6. So far as reliance placed on the judgment reported in the case of Fakir Singh Vs. Bijaya Kumar Bagaria, in which Nira @ Niranjan Mohanty

Vs. Narayan Padhan and Others, is concerned, it is found that in the said case on 2.8.1999 the complainant was present, initial statement of the

complainant was recorded and thereafter cognizance was taken u/s 394, IPC calling on 7.8.1999 for enquiry u/s 202 Cr.P.C. Considering the said

order, this Court held that the learned Magistrate took cognizance first and conducted enquiry u/s 202 Cr.P.C. afterwards and therefore the said

order is not sustainable. But the fact of the said case is not applicable to the present case in view of the fact that order dated 7.4.1997 which has

been relied upon by Mr. Jena, learned counsel for the petitioners does not indicate that the learned Magistrate has taken cognizance of any

offence, rather the learned Magistrate directed for enquiry u/s 202 Cr.P.C. Thereafter, he caused enquiry and gave opportunity to the complainant

to examine all the witnesses including herself vide order dated 5.1.1998 and finding a prima facie case u/s 366/376/109, IPC, the learned

Magistrate took cognizance of the above offences against the petitioners. In view of such position, the contention raised by the learned counsel for

the petitioners is not acceptable.

7. Learned counsel for the petitioners referred to the case of Dhaneswar Behera and others v. State of Orissa and others (1988) 1 OCR 41 in

which this Court quashed the cognizance taken by the learned Magistrate under

Sections 302/201, IPC in a case in which police agency submitted

the final report and the learned Magistrate treated the protest petition as a petition of complaint and registered as I.C.C. Case on the ground that

when the offence is triable by Court of Sessions, the learned Magistrate cannot take cognizance without examining all the witnesses for the

complainant. To arrive at such conclusion this Court relied upon the judgments in Gokulananda Mohanty and Others Vs. Muralidhar Mallik, Guljar

Hussain Vs. Krishna Loila and Others, Omprakash Saha Vs. Manmohan Mohanty and Another, 759 to the effect that in a complaint case triable

exclusively by the Court of Session, no cognizance can be taken by a Magistrate without examining all the witnesses for the complainant as

required by the proviso to Section 202(2) of the Cr.P.C. and on the basis of statements of some witnesses made in the course of investigation by

the police agency. The proposition laid down by the Court is not disputed rather the fact of each case has to be decided on its own facts and

circumstances of the case, which is the settled principle of law as laid down by the Hon"ble Supreme Court in the case of The State of Orissa Vs.

Sudhansu Sekhar Misra and Others,

8. In the present case, the complainant after examining three witnesses filed a memo stating, inter alia, that she does not want to examine any more

witness to substantiate her complaint. When the complainant herself declined to examine other witness mentioned in the complaint petition, on the

basis of initial statement she relinquished to examine herself.

9. Similar view has been taken by this Court in Kartikeswar Nayak Vs. Karadi Jagannath and Others, wherein in para-5 of this Court observed as

follows:

The scope of an enquiry u/s 202 of the Code is no longer res integra. In Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and others, reliance

was placed on two earlier decisions reported in Chandra Deo Singh v. Prakash Chandra Bose alias Chabi Bose and another and Vadilal Panchal

v. Dattatraya Dulaji Ghadigaorkar and another, and it was held as follows:

It would thus be clear from the two decisions of this Court that the scope of the enquiry u/s 202 of the Code of Criminal Procedure is extremely

limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint - (i) on the materials placed by the complainant

before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding

the question purely from the point of view of the complainant without at all advert to any defence that the accused may have. In fact it is well

settled - that in proceedings u/s 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the

process should be issued against him or not.

It was further examined as to whether in an enquiry u/s 202 of the Code, it was open to the Judicial Magistrate to determine the truth or falsity of

the complaint. It was held as follows:

..... It is true that in coming to a decision as to whether a process should 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 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 which

culminate into an order u/s 204 of the Code. Thus it may be safely held that in the following cases an order of the Magistrate issuing process

against the accused can be quashed or set aside:

(1) Where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make

out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the

accused;

(2) Where the allegations made in the complaint are potently absurd and inherently improbable so that no prudent person can ever reach a

conclusion that there is sufficient ground for proceeding against the accused;

(3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on

materials which are wholly irrelevant or inadmissible; and

(4) Where the complaint suffers from fundamental legal defects, such as, want of sanction or absence of a complaint by legally competent authority

and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash

proceedings.

(Also see *Samir Chandra Guha and another v. K. Pradhan and another and Kewal Krishan v. Suraj Bhan and another*).

The procedure laid down in the proviso to Section 202(2) of the Code with regard to cases exclusively triable by the Court of Session was

introduced in the new Code and has been interpreted by different High Courts. In this Court the first case of its time was reported in the *State v.*

Kastu Behera.

The legality of the case of *Kastu Behera* (supra) was called in question in *Gokulananda Mohanty and others v. Muralidhar Mallik*. After taking

several decisions into consideration including *Boya Lakshmanna v. Boyachinna Narasappa and another, Paranjothi Udyar and others v. State and*

others, Kamal Krishna De v. State and another and Babu Ram and another v. State of Uttar Pradesh a Division Bench of this Court held:

When the Magistrate after examining the complainant and his witnesses u/s 200 of the Code of Criminal Procedure is of the view that an offence

exclusively triable by the Court of Session appears to have been made out, he is bound to take action under the proviso to Section 202 of the

Code and there is no discretion left in him not to hold such enquiry. In the enquiry, which is bound to be undertaken, he has to call upon the

complainant, examine them on oath.

The principle laid down in the case of *Gokulananda Mohanty* (supra) has been uniformly followed by this Court. The decision to name a few are *E.*

Ketra and others v. Khal Madhab and others, in which also a supporting Division Bench decision of the Andhra Pradesh High Court reported in

Ramachander Rao Jadu Behera and others v. Dhaneswar Samantaray, Kartikeswar Nayak v. Karadi Jagannath and 11 others, and another

Division Bench decision reported in Ramesh Samal and eight others v. Chabi Mandal and another. So, the uniform view of this Court is in cases

exclusively triable by the Court of Session the procedure laid down in the proviso to Section 202(2) of the Code for examination of all witnesses

requires strict compliance. This view of the Court finds support from a number of decisions of different High Courts, such as, Kamal Krishna De v.

State and another (supra) (Calcutta), Ramchander Rao and others v. Boina Ramchander and another (supra) and (Andhra Pradesh), Shyamkant

Wamanrao Pawar and others v. State of Maharashtra and others (Bombay), Dinesh Chan Sinha v. Rahmatullah and another (Allahabad), Ranjit

Guja Neogi v. State and another (Calcutta), Moideenkutty Haji and others v. Kunhikoya and others (Kerala).

5. Despite the pronouncement of this Court on the applicability of the proviso to Section 202(2) of the Code to the cases exclusively triable by the

Court of Session instituted on complaint, in two decisions of this Court, a slightly different view was taken and in both of them the leading case of

Gokulananda Mohanty (supra) was not noticed. In State of Orissa v. Khetrabasi Biswal and others, a learned Judge of this Court held that if it

appears to the Magistrate that the offence complained of is triable by the Court of Session, he shall call upon the complainant to produce all his

witnesses and examine them on oath. He is not required to examine the complainant. He is required to examine only the witnesses produced by the

complainant. The expression ""his witnesses"" cannot include the complainant himself. In Kartikeswar Nayak v. Karadi Jagannath & 11 others

(supra) relying upon the case of Gokulananda Mohanty (supra) it was held that in an enquiry according to the proviso to Section 202(2) of the

Code, besides the witnesses named in the complaint petition, the complainant is bound to examine himself, because ultimately during trial after

commitment he will be required to be examined as a witness for the prosecution. The earlier case, however, was not noticed, but it was interpreted

that ""all his witnesses"" included the complainant himself. In Subash Bastia and others v. Bhagabat Bastia and another, though one of the allegations

was for an offence u/s 436, IPC exclusively triable by the Court of Session, no reference was made to the proviso to Section 202(2) of the Code

and it was held that if the complainant does not examine some of the witnesses present, but examines those named in the complaint petition, the

issue of processes was not vitiated. Broadly speaking, however, in these two decisions the larger principle laid down in the case of Gokulananda

Mohanty (supra) was not differed from.

10. In view of the aforesaid settled position of law and applying the same to the present case, it is found that the complainant has examined three

witnesses and filed a memo that she would not adduce any more witness during the enquiry and basing on her initial statement recorded by the

learned S.D.J.M., Balasore, cognizance has been taken but that ipso facto cannot vitiate the proceeding itself, but that may be an inherent lacuna,

which the Magistrate can adhere to, by applying the same giving opportunity to the complainant. Therefore, for all those reasons, I am of the view

that, although the impugned orders are to be vacated but the complaint case should be remanded to the Court of the learned S.D.J.M., Balasore

so that the learned Magistrate will give an opportunity to the complainant to examine the remaining witnesses in course of enquiry and dispose of

the same in accordance with law and allow her to examine herself in compliance of the provisions contained u/s 202(2) Cr.P.C. as the offences

alleged are grievous in nature. Be it stated here that it will not be necessary to re-examine the witnesses as already examined in course of enquiry

and the statements made by them on oath shall be taken into consideration for formulation of opinion.

11. Mr. K.K. Jena, learned counsel for the petitioners brought to the notice of the Court by filing a memo that during pendency of this case,

Narahari Behera-opposite party No. 4 expired on 15.11.2004 and also produced xerox copy of the death certificate issued by the Department of

Health & Family Welfare in support of his contention. Therefore, the case is abated as against the opposite party No. 4-Narahari Behera, as he is

no more there. He has also further brought to the notice of the Court that in the meantime, Sessions Trial Case No. 19/63 of 1997 initiated against

one of the accused namely, Sanjay Kumar Behera under Sections 363/366, IPC has ended in acquittal vide judgment dated 5.10.2002. Since the

offence alleged is arising out of the same proceeding and the same incident and by facing trial, accused Sanjay Kumar Behera has been acquitted

and the allegation made against him has not been substantiated by following a trial, the complaint as against him also cannot be sustainable in view

of Section 300 Cr.P.C.

12. So far as remaining two accused persons, namely, Kamalakanta Modi and Balai Chandra Das, the order of cognizance is vacated subject to

the observation made above and I.C.C. Case No. 113 of 1997 is remanded back to the Court of learned S.D.J.M., Balasore for disposal of the

same in accordance with law. With the above observation and direction, the CRLMC is disposed of.