

(2016) 06 OHC CK 0034

In the Orissa High Court

Case No : CRLMC Nos. 4189 and 4948 of 2015

Madhoo @ Madhab Ch. Khuntia

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 29-06-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173(2)(8), 482

Citation : (2016) 122 CutLT 700 : (2016) 2 ILRCuttack 357

Hon'ble Judges : B.K. Nayak, J.

Bench : Single Bench

Advocate : Mr. Milan Kanungo, Senior Advocate, for the Petitioner; Addl. Govt. Advocate, for the Opposite Party

Final Decision : Dismissed

Judgement

B.K. Nayak, J.—These two applications under Section 482, Cr.P.C. are filed by the same petitioner and they arise out of G.R. Case No.1726 of 2012 of the court of the learned S.D.J.M., Puri, which arises out of Puri Town P.S. Case No.117 of 2012 registered for alleged commission of offences under Sections 120-B/302/379/201/34 of the I.P.C. read with Sections 25 and 27 of the Arms Act for murder of one Guna @ Taluchha Bhagaban Mohapatra.

2. CRLMC No. 4189 of 2015 has been filed challenging the order dated 16.12.2013 passed by the learned S.D.J.M., Puri in G.R. Case No. 1726 of 2012 directing issuance of NBW against the present petitioner, whereas CRLMC No. 4948 of 2015 has been filed by the same petitioner challenging the order dated 17.05.2014 passed by the learned S.D.J.M., Puri in the same G.R. Case directing issuance of process under Sections 82 and 83 of the Cr.P.C. against the petitioner.

3. The undisputed facts are that during the course of investigation, the police apprehended six other accused persons in the aforesaid case, who continued in judicial custody. On 24.12.2012, the Investigating Officer submitted preliminary charge-sheet in terms of Section 173 (2), Cr.P.C. against those six accused

persons under Sections 302/379/201/120-B/34 of the I.P.C. and Sections 25 & 27 of the Arms Act, keeping the investigation open with regard to involvement of other persons in the crime. On receipt of the charge-sheet, the learned S.D.J.M. took cognizance of the offences against those charge-sheeted accused persons. On 22.01.2013, the learned S.D.J.M. committed those six accused persons to the Court of Session. Since the investigation had been still kept open, the learned S.D.J.M. opened a part file as G.R. Case No. 1726 of 2012 (A) and sent the original records to the Court of Session. Subsequently, during the course of further investigation, the Investigating Officer made prayers to the learned S.D.J.M. in the split up G.R. Case to issue NBW and process under Sections 82 and 83, Cr.P.C. against the present petitioner, who was said to have been absconding. Those prayers have been allowed by the impugned orders.

4. Learned Senior Counsel appearing for the petitioner raises two contentions, that once the learned SDJM took cognizance of the offences and committed the case to the court of session, thereafter he does not have any further power to take cognizance again and that after the commitment it is only the court of session who is competent to take cognizance against the persons appearing from the materials on record to be involved in the commission of offences or the court may issue process subsequently during trial under Section 319, Cr.P.C. only when evidence with regard to involvement of any person is found. Therefore, the learned S.D.J.M. has no power to issue NBW against the present petitioner. In this connection, the learned counsel for the petitioner relies on the Constitution Bench decision of the Hon'ble Supreme Court in the case of Dharam pal & Ors. v. State of Haryana and Another : AIR 2013 SC 3018 and similar other decisions. It is his further submission that the petitioner has not been named in the F.I.R. nor any material with regard to his involvement came forth till the time of submission of charge-sheet against the apprehended accused persons and that any further material, if any, against the petitioner collected after submission of charge-sheet against the apprehended accused persons is fabrication at the behest of persons inimically disposed of towards the petitioner and therefore, the impugned order directing issuance of NBW and the subsequent impugned order directing issuance of process under Sections 82 and 83 of the Cr.P.C. are legally unjustified and hence liable to be set aside.

5. Learned counsel for the opposite parties submitted that since the investigation into the case had not been fully over and that charge-sheet was filed only against some of the accused persons and the investigation was further kept open which is proceeding, it cannot be said that the learned S.D.J.M. is incompetent to pass orders for issuance of NBW and process under Sections 82 & 83 of the Cr.P.C. against the petitioner against whom some incriminating materials have come to light during such further investigation. It is submitted that since under Section 173 (8) of the Cr.P.C. the Judicial Magistrate has power to direct or allow further investigation, it has the jurisdiction to deal with any other accused persons whose complicity in the crime can be prima facie found out during such further investigation.

6. The main plank of argument of the learned Senior Counsel appearing on behalf of the petitioner is that since charge-sheet was submitted against apprehended accused persons and cognizance was taken of the offences and the case has already been committed to the court of session, the Magistrate has no further power to take cognizance of the offences against the petitioner in the event any further charge-sheet would be filed and that it is the Court of Session, which is only to take cognizance as decided in the case of Dharam Pal & Ors. (supra).

7. In the instant case, we are not confronted with the question whether the Judicial Magistrate will take cognizance of the offences, so far as the present petitioner is concerned, in the event charge-sheet is submitted against him. Admittedly, the offence is one under Section 302, I.P.C. along with other sections including Section 120-B of the I.P.C. Further investigation of the case is still going on in terms of Section 173 (8) of the Cr.P.C. with regard to complicity of the present petitioner and other persons. The argument advanced by the learned Senior Counsel for the petitioner relying on the decision of the apex Court in the case of Dharam Pal & Others (supra) is not relevant for the lis in hand. Should charge-sheet be filed against the petitioner or any other person after further investigation, the Magistrate need not have to further take cognizance of the offences. He has only to commit the case to the Court of Session in respect of such new accused persons. This is so laid down in Dharama Pal's case (supra) where in paragraph-27, the Constitution Bench has held as follows :

27. This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Sessions assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Sessions Judge."

The contention of the learned counsel for the petitioner, therefore, does not hold good.

8. On the contrary, the question that arises is whether it is competent for the Magistrate to direct or permit further investigation of a case where charge-sheet has already been submitted against some accused persons in terms of sub-

section (2) of Section 173, Cr.P.C. It is trite law that the Magistrate has power to permit further investigation in terms of sub-section (8) of Section 173, Cr.P.C. It has been held by the Hon'ble Supreme Court in the case of State of Punjab v. Central Bureau of Investigation & Ors: AIR 2011 S.C.2962 as follows:

"13. Sub-section (1) of Section 173 of the Cr.P.C. provides that every investigation by the police shall be completed without unnecessary delay and sub-section (2) of Section 173 provides that as soon as such investigation 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, a report in the form prescribed by the State Government. Under sub-section (2) of Section 173, a police report (charge-sheet or challan) is filed by the police after investigation is complete. Sub-section (8) of Section 173 states that nothing in the Section shall be deemed to preclude any further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate. Thus, even where charge-sheet or challan has been filed by the police under sub-section (2) of Section 173, the police can undertake further investigation but not fresh investigation or re-investigation in respect of an offence under subsection (8) of Section 173 of the Cr.P.C."

9. Taking up or continuing with further investigation by the police under Section 173 (8), Cr.P.C. and the Magistrate permitting the same is distinct from the power of superior courts, such as the High Court and the Supreme Court, to direct re-investigation or fresh investigation of the case. Re-investigation or fresh investigation is one done by another investigating agency irrespective of whether the previous investigation by the police has already been completed in all respects or not, whereas further investigation is one by the same agency where investigation is not fully complete, but charge-sheet under Section 173 (2), Cr.P.C. might have been filed against some accused persons at any stage of the investigation before its final completion.

10. In the instant case, though charge-sheet was submitted against six apprehended accused persons, the Investigating Officer kept the investigation further open which is still continuing. Investigation is not finally over. It is legal and competent for the investigator to proceed with the investigation in accordance with the provision of sub-section (8) of Section 173, Cr.P.C. In the event during such further investigation, the investigator collects materials with regard to complicity of any other person(s) in the alleged offences, it can take recourse to other provisions of the Cr.P.C. including making a prayer to the Magistrate to issue NBW and/or process under Sections 82 and 83 of the Cr.P.C., if the situation so demands. The impugned orders of the S.D.J.M. in the instant case directing issuance of NBW and process under Sections 82 and 83 of the Cr.P.C. are not challenged on merits, but only on the ground of competency of the Magistrate as aforesaid. Since it is found that the Magistrate is competent to issue such process where the investigation or further investigation is still continuing and he is still in seisin of the matter and some materials have come to

light about complicity of the petitioner, no exception can be taken to his authority to pass the impugned orders. I therefore, find no merit in these applications, which are accordingly dismissed.