

(2001) 06 OHC CK 0002

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 3287 of 2001

Mahima ' Mahimananda Mishra and others

APPELLANT

Vs

State of Orissa and others

RESPONDENT

Date of Decision : 20-06-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 173(2), 173(3), 173(4), 173(5)
Penal Code, 1860 (IPC) — Section 156(3), 34, 364

Citation : (2001) 94 CLT 174 : (2001) 92 CLT 174 : (2001) 21 OCR 133 : (2001) 2 OLR 104

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : M/s Bijan Ray and G.N. Mohapatra, P.K. Sahoo, A.K. Mohapatra, B.N. Mohapatra and L.N. Patel, for the Appellant; Addl. G.A., M/s Ashok Mohanty, T. Rath, J. Saha, H.K. Tripathy, J.P. Patnaik and M.K. Rout, for the Respondent

Final Decision : Allowed

Judgement

L. Mohapatra, J.—This application u/s 482 of the Code of Criminal Procedure ("the Code", for short) has been filed for quashing the further investigation in Paradeep P. S. Case No. 162 of 1995, corresponding to G. R. Case No. 336 of 1998 pending in the court of the learned judicial Magistrate, First Class (P), Kujang.

2. The case of the petitioners is that petitioner No. 1 is the Managing Director of Orissa Stevedores Limited, Petitioner No. 2 is one of the Directors of the said Company and petitioner No. 3 is a Senior Executive working in the said Company. One Soumesh Chakravarty lodged F. I. R. in Paradeep P. S. on 13-7-1995 stating that some unknown persons kidnapped one P. C: Das, opposite party No, 2, who is an Executive of M/s. J. M. Baxi & Co. while they were staying in Hotel Golden Anchor, Paradeep, in room No. 104. On the basis of the said F. I. R., Paradeep P. S. Case No. 162J95 was registered for offences alleged to have been committed u/s 364/34, I. P. C. and the corresponding G. R.

Case No. 336 of 1995 was also registered in the court of the learned Judicial Magistrate, First Class ("J.M.F.C." for short) at Kujang. After investigation, final report was submitted in the said case stating that there is no clue. The informant was given notice to file objection and despite several adjournments, since no objection was filed, the final report was accepted by the Court. After acceptance of the final report, the case has been reopened again for further investigation without obtaining permission of the court and such further investigation is under challenge before this Court.

3. Shri Bijan Ray, learned Senior Advocate appearing for the petitioners, submitted that one A.K. Sarangi who was working as Superintendent of Police, Jagatsinghpur, from 14-4-1995 to 20-7-1995 is instrumental in initiating further investigation into the matter maliciously and purposefully to harass the petitioners. This submission of Shri Ray was vehemently opposed by the learned Additional Standing Counsel Shri Pradhan. In course of argument both the parties agreed that the only question of law that is required to be determined is as to whether for the purpose of further investigation u/s 173(8) of the Code, permission of the learned Magistrate is required or not. Admittedly in the present case no permission has been obtained from the learned Magistrate while taking up further investigation or reopening the case for the purpose of further investigation. Before deciding the question as to whether permission is required or not, it is necessary to look into the background of the case and orders passed by the learned Magistrate.

4. As it appears from the record, F. I. R. was lodged by one Soumesh Chakrabarty on 13-7-1995 in Paradeep police station that some unknown persons kidnapped one P. C. Das, opposite party No. 2, who was working as an Executive in M/s. J. M. Baxi & Co. while he was staying in Hotel Golden Anchor at Paradeep in room No. 104. On the basis of the said F. I. R., Paradeep P.S. Case No. 162 of 1995 for the offence, alleged . to have been committed u/s 364/34 of the Penal Code was registered. Investigation was taken up thereafter and from, the certified copy of the order-sheets in G. R. Case No. 336 of 1995 it appears that on 31-10-1996 final report was submitted by the investigating agency stating that there was no clue. Upon receipt of the said final form the learned Magistrate by order dated 31-10-1996 issued notice to the informant for filing objection and posted the case to 5-12-1996. On 5-12-1996 one Shri S. C. Das, Advocate, appeared on behalf of the informant and prayed for time to file objection. The case was again posted to 19-12-1996 for filing objection. Again on 19-12-1996 another petition was filed for adjournment by the Advocate appearing for the informant and the case was adjourned to 13-2-1997. On 13-2-1997 also no objection was filed and the learned Magistrate passed the following order :

"13-2-97--The record is put up today. Several adjournments already allowed. No objection is filed. F. R. T. u/s. 364/34, I. P. C. is accepted."

After acceptance of the final report on 13-2-1997 on the basis of application filed

by the investigating agency, for further investigation u/s 173(8) of the Code the case was again taken up on 31-10-1998. The case was adjourned to 21-12-1998 and again to 26-2-2001. On 26-2-2001 the learned Magistrate passed the following order :

"26-2-2001. I. I. C. Paradeep P.S. made a prayer through C. S. I., Kujang to pass necessary order to return the original case record to I.I.C. Paradeep P. S. so as to enable him to make over the same to the Investigating Officer of the State C. I. D. C. B., Cuttack, Perused the prayer, There is no such provision to return the original case record to I. I. C. Paradeep P. S. . Hence the prayer is rejected being devoid of merit."

From the order-sheets it is clear that no permission was sought for further investigation u/s 173(8) of the Code and it further appears that the investigating agency only prayed for return of the records on the ground that the same shall be handed over to the Crime Branch for further investigation u/s 173(8) of the Code- Learned counsel for petitioners submitted that this application for grant of permission was rejected by the learned Magistrate. But it appears from the order dated 26-2-2001 that the learned Magistrate rejected the prayer of the investigating agency for return of the records stating that there is no such provision in the Code for return of the records. But it is clear from the entire order-sheet that at no point of time prayer was made for grant of permission for further investigation u/s 173(8) of the Code, This position is also not disputed by the learned Additional Standing Counsel.

5. Coming to the question raised by both the parties as to whether permission is at all required or not, some decisions have been cited by learned counsel for both sides. Shri Bijan Ray, learned Senior Advocate relies upon the decision of this Court reported in Gobardhan Das and Others Vs. State of Orissa, and submits that prior permission of the Magistrate is necessary for further investigation u/s 173(8) of the Code. In the aforesaid case after investigation charge-sheet was submitted before the learned Magistrate against 24 accused persons citing 33 persons as charge-sheet witnesses. The learned Magistrate took cognizance on the basis of such report. After cognizance was taken the Inspector of Police intimated the court that as per the direction of the Superintendent of Police, Dhenkanal he had reopened investigation and be forwarded another accused after further investigation in connection with the said case and the court was intimated that charge-sheet would be submitted. After reopening of investigation/ further investigation, a case was filed before this Court. In paragraph 5 of the judgment referring to a decision of the Apex Court as well as decisions of this Court it was observed that where the police desires to make further investigation, it should express its desire in that respect in the court by seeking further permission to make further investigation, inasmuch as it would be desirable that the police should inform the court and seek further permission to make further investigation whenever fresh facts come to light. The court further observed that in absence of a formal permission alone further investigation or

submission of a further charge-sheet is not vitiated if fresh facts come to light in case further investigation. However, in paragraph 7 of the judgment it was observed that there is necessity of a prior permission from the Magistrate concerned for reopening of a case for further investigation u/s 173(8) of the Code after submission of charge-sheet u/s 173(2) where cognizance has been taken.

6. In this connection reference may also be made to the decision of this Court reported in 1999 17 O. C. R. 533 : (supra). This Court in the aforesaid decision held that the investigating agency should seek prior permission of the Magistrate for reopening a case for further investigation, but failure to seek prior permission will not vitiate further investigation as the Magistrate has to consider the report on further investigation and the accompanying materials before deciding as to whether he should take cognizance or not.

7. In another decision of this Court reported in 1994 7 O.C.R. 139 : Surendra Sahoo and others v. State of Orissa, this Court had the occasion to discuss the scope of further investigation u/s 173(8) of the Code. This Court by discussing the scope of section 173(8) of the Code came to a conclusion that an Investigating Officer is not debarred from making further investigation and submit a further report regarding additional evidence after cognizance has been taken. If further investigation is necessary, permission of the Magistrate may be sought, but mere absence of permission would not make the order vulnerable and the Magistrate can act on the further report of the Investigating Officer on additional facts.

8. On the basis of the aforesaid decisions it is contended by Shri Ray that no prior permission of the court having been obtained for further investigation, such investigation is vitiated. I am afraid the contention raised by the learned counsel for petitioners is not acceptable in view of what this Court has decided in the aforesaid cases. In all the decisions cited above the Courts are clearly of the view that it is desirable that the investigating agency should take permission of the Magistrate for further investigation u/s 173(8) of the Code, but mere absence of the permission will not vitiate the further investigation under the said provision. Therefore, the ratio laid down by this Court is that though it is desirable to obtain permission, but only in absence of permission further investigation shall not be vitiated. Shri Ray tried to distinguish the present case stating that the present case stands on a much better footing than the reported cases, as cognizance had been taken in those cases whereafter further investigation was conducted, but in the present case the final report submitted by the investigating agency was accepted after giving several opportunities to the informant to file objection and therefore, in the facts of the present case, it was the duty of the investigating agency to take permission of the learned Magistrate. In this connection reference may be made to decision of the Apex Court reported in 1995 8 O.C.R 267 : State of Rajasthan v. Arun Devi and others. In the reported case a complaint was filed in the court of the Judicial Magistrate alleging offences under various sections of

the Penal Code. The Magistrate after perusal of the complaint directed an investigation as contemplated u/s 156(3) of the Code and the Police after investigation submitted a final report stating that the complaint was false. The said report was accepted by the learned Magistrate. However, the Superintendent of Police independently ordered for further investigation and after such investigation the charge-sheet was filed and the Magistrate took cognizance. The said order of the learned Magistrate was challenged before the Rajasthan High Court. The High Court was of the view that once the Magistrate had accepted the final report he had no jurisdiction to take cognizance any further. The Apex Court set aside the findings of the High Court and observed that further investigation u/s 173(8) is permissible and the Magistrate had jurisdiction to take cognizance, even after accepting the final report earlier.

9. In view of the decision of the Apex Court as stated above, the contention of Shri Ray fails. Though it is found from the order-sheets that no permission has been taken from the learned Magistrate for further investigation u/s 173(8) of the Code, in view of the decisions of this Court in absence of such permission, further investigation is not vitiated, though it was desirable on the part of the investigating agency to obtain permission of the learned Magistrate.

10. Coming to the next question raised by the learned counsel for petitioners that the conduct of the Crime Branch in reopening investigation is mala fide and motivated, it is required to refer to section 173(8) of the Code to find out under what circumstances further investigation can be made. The said provision is quoted below :

"Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, whereupon such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

The sub-section is very clear to the extent that further investigation is not precluded in respect of an offence after a report under sub-section (2) is submitted before the Magistrate and where upon such investigation the officer-in-charge obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed, and the provisions of sub-sections (2) to (6) of section 173 of the Code shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

From the records it appears that at the first instance investigation was conducted on the basis of the F. I. R. and on 31-10-1996 final form was submitted u/s 173(2) stating that there is no clue. Even after notice to the informant, since no

objection or protest petition was filed, the report was accepted by order dated 13-2-1997. Almost one year and eight months after acceptance of the final report, the petition was filed before the learned Magistrate for return of the records for the purpose of further investigation, u/s 173(8) of the Code. It further appears from the record submitted by the learned Additional Standing Counsel that though a prayer was made in the year 1998 for further investigation, no witnesses were examined till 7-4-2001 and the first witness Pratap Chandra Das was examined on 8-4-2001. Shri Ashok Mohanty, learned counsel who appears for said Pratap Chandra Das, arrayed as opposite party No. 2 in this application, in course of argument submitted that opposite party No. 2 has not made any statement before the Crime Branch. Though Shri Mohanty was asked to file an affidavit to that effect, no such affidavit has been filed. In any event, in view of the statement made by the learned counsel in the court, a doubt is created in the mind as to whether the said witness was ever examined or not. It further appears that Shri A. K. Sarangi, who was the Superintendent of Police, Jagatsinghpur, from 14-4-1995 to 20-7-1997 has also given a statement u/s 161, Cr. P. C. and his statement has been recorded on 17-3-2001. In the statement the officer has stated about pressure put on him by a senior officer as well as by one politician to help the petitioners while he was working as Superintendent of Police at Jagatsinghpur. Now the question arises as to whether the statement made by Shri Sarangi is bona fide or motivated. There is no dispute that Shri Sarangi was working as S. P., Jagatsinghpur at the time when the concerned F. I. R. was lodged and he had knowledge about the investigation of the said case. But he never made any such statement before final form was submitted on 31-10-1996. The investigating agency had thought of further investigation u/s 173(8) in October, 1998 and had filed a petition for return of the records on 31-10-1998. From 1998 till 17-3-2001 Shri Sarangi kept quiet and never made any statement and it is not known as to why a responsible officer of the Police Department comes forward to make a statement almost more than five years after the date of occurrence. Therefore, the conduct of Shri Sarangi in giving a statement u/s 161, Cr. P. C. does not appear to be bona fide. Similarly all the witnesses examined so far were only examined in the year 2001. It appears from the case diary that out of the three witnesses examined so far, Pratap Chandra Das who is the injured was available to be examined. It further appears from the case record that the said Pratap Chandra Das was undergoing treatment in Vishakhapatnam and the investigating agency knew about the same and had requested him to come to Jagatsinghpur for examination. However, no steps were taken by the investigating agency to examine Pratap Chandra Das at Vishakhapatnam as he could not come to Jagatsinghpur for his examination. As discussed earlier, Shri Sarangi was also available to be examined and in fact he was working as the S. P. of Jagatsinghpur at the relevant time, but never offered to get himself examined, whereas almost more than five years after the incident he has come forward to give such statement, as discussed earlier. So far as the other witness, namely, Sudarshan Das is concerned, it appears from the case diary that the said witness was examined during the previous investigation on

29-7-1995 and considering his statement also the final report had been submitted. If such a witness was examined earlier and after considering his statement the final report was submitted, the further investigation on the basis of evidence of the same witness does not come within the ambit of section 173(8). It also appears from the case diary that on 25-10-1996 at about 8.15 a. m. in the morning the Investigating Officer had discussed about the case with the then S. P. who passed an order to return the case submitting final report on the ground that the victim Pratap Chandra Das was not available for examination and was not coming to his native place and was staying at Vishakhapatnam, I am afraid the scope of further investigation u/s 173(8) cannot be stretched to the extent where it appeals to the court that the entire purpose of further investigation is not bona fide.

12. I am, therefore, of the view that reopening the investigation by examining those witnesses who were examined or available to be examined at the time of earlier investigation and recording their statements almost five and half years after the final form was submitted do not appear to be bona fide and further investigation on the basis of statements of witnesses available to be examined during earlier investigation amounts to abuse of process of court and exercise of powers not intended to be exercised u/s 173(8) of the Code. The scope of section 173(8) of the Code cannot be stretched to that extent. Having observed that further investigation by the Crime Branch by way of examining these witnesses is not bona fide, I quash further investigation on that ground. However, it shall be open for the investigating agency to make further investigation in terms of section 173(8) of the Code on the basis of such materials which were not available at the time of earlier investigation or not within the knowledge of the investigating agency. The Criminal Misc. Case is allowed.

13. Crl. misc. case allowed.