
(2010) 12 PAT CK 0021
In the Patna High Court
Case No : Cr. Misc. No. 8345 of 2001

Mehru Nisha

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 13-12-2010

Acts Referred:

Citation : (2010) 12 PAT CK 0021

Final Decision : Allowed

Judgement

Jyoti Saran, J.—Heard learned Counsel for the parties.

2. This application is directed against the order dated 3.2.2001 passed in Cr. Rev. No. 17 of 2001 (Mehru Nisa v. State of Bihar) by the learned Sessions Judge, Saharsa preferred on behalf of the Petitioner assailing the order dated 5.1.2001 passed by the Chief Judicial Magistrate, Saharsa in Salkhua P.S. Case No. 64 of 2000 whereby the Chief Judicial Magistrate, Saharsa has discharged the F.I.R. named accused and had taken cognizance against two non F.I.R. named persons namely Md. Akbar @ Laloo and Md. Akhlad on the basis of the final form/charge-sheet submitted by the police.

3. Brief facts of the case is that the Petitioner is the widow of deceased Md. Hafiz Ahmad of Village-Mubarakpur, P.S. Salkhua, District-Saharsa. It is stated that on the date of occurrence, her nephews namely, Md. Abu Fateh, Md. Gauhar @ Munna and Md. Kalam, all sons of Md. Salauddin alongwith Md. Sanjar son of Abu Fateh, Md. Naushad and Md. Ajaj had come to the residence of the informant-Petitioner on motorcycle and it is stated that during the course of altercation which took place in relation to certain landed property, accused Md. Abu Fateh took out a firearm and shot at her husband who fell down and succumbed to the gun injury giving rise to Salkhua P.S. Case No. 64 of 2000. Six persons were named by the informant-Petitioner as being a party to the occurrence of which the Md. Abu Fateh was said to be the assailant. It is stated that the Petitioner having sensed that the Investigating Officer was not properly investigating the matter, filed a protest petition dated 3.8.2000 before the Chief

Judicial Magistrate, Saharsa, copy whereof is placed at Annexure-3 to this application. The Petitioner complained that the Investigating Officer had been gained over by the F.I.R. named accused and thus requested personal hearing before any order be passed on the final form.

4. Learned Counsel for the Petitioner submits that as having been sensed by the informant-Petitioner, the Investigating Officer submitted a final form in favour of the six F.I.R. named accused but submitted charge-sheet against Md. Akhlad and Md. Akbar @ Laloo. It is stated that Md. Akhlad is the son of deceased and informant Petitioner. It is stated that the final form and charge-sheet was submitted by the Investigating Officer on 22.12.2000. It is stated that consequent upon submission of the final form/charge-sheet the Petitioner again filed another petition before the Chief Judicial Magistrate, Saharsa on 2.1.2001 with a prayer for taking cognizance against the F.I.R. named accused considering the evidence available and the circumstances set out in the F.I.R.

5. Learned Counsel submits that despite the aforesaid position the Chief Judicial Magistrate vide order passed on 5.1.2001 (Annexure-6) mechanically rejected the prayer made on behalf of the Petitioner and accepted the final form/charge-sheet as submitted by the Investigating Officer in terms of the recommendations made therein. He submits that in terms of the report of the police and the Investigating Officer the Chief Judicial Magistrate discharged the F.I.R. named accused persons and took cognizance against the two non-F.I.R. named accused namely Md. Akhlad and Md. Akbar @ Laloo.

6. Learned Counsel for the Petitioner submits that being aggrieved by the order taking cognizance dated 5.1.2001 (Annexure-6) the Petitioner preferred a revision application bearing Cr. Rev. No. 17 of 2001 before the Sessions Judge, Saharsa and which was disposed of by the impugned order dated 3.2.2001 with a direction to the Court below to hear the informant Petitioner at the stage of framing of charge and/or take appropriate action if the evidences come against the discharged F.I.R. named accused, u/s 319 of the Code of Criminal Procedure.

7. Learned Counsel raises a very short question through the present application filed u/s 482 of the Code of Criminal Procedure. He submits that the Chief Judicial Magistrate was well within his jurisdiction to pass the order dated 5.1.2001 as contained in Annexure-6 but only after giving an opportunity of hearing, to the informant Petitioner, more particularly in view of the protest petition having been filed by the informant on 3.8.2000 i.e. much prior to the submission of the charge-sheet/final form on 22.12.2000. He submits that informant Petitioner on his part again drew attention of the Chief Judicial Magistrate, Saharsa by filing another petition on 2.1.2001 however, the same were mechanically rejected by the order dated 5.1.2001.

8. He further submits that the order impugned passed by the Sessions Judge in the revision preferred by the Petitioner bearing Cr. Rev. No. 17 of 2001 dated 3.2.2001 in no manner cures the defect which had arisen at the stage of passing

of the order taking cognizance against non- F.I.R accused and discharge against the accused persons.

9. Learned, counsel for the Petitioner in support of his submissions aforesaid relies on the following judgments:

(a) 1978 PLJR 169 paragraphs 5 and 6, Dr. Mrs. Sakina Hanif v. Ghulam Haider and Ors..

(b) Bhagwant Singh Vs. Commissioner of Police and Another,

(c) Union Public Service Commission Vs. S. Papaiah and others,

10. In all these cases it has been held that where the Magistrate decides to take cognizance of the offence and to issue process, the informant is not prejudicially affected because cognizance of the offence is taken by the Magistrate and it is decided by the Magistrate that the case shall proceed. In such situation the informant is not required to be heard. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient grounds for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the First Information Report, the informant would certainly be prejudiced and would require personal hearing because the First Information Report lodged by him would have failed of its purpose, wholly or in part.

11. Learned Counsel thus submits that in view of the position settled by the judgments of this Court and the Supreme Court, the order passed by the Chief Judicial Magistrate dated 5.1.2001 as contained in Annexure-6 and the order passed by the Sessions Judge impugned in this application cannot be sustained.

12. Mr. Anil Kumar Mukund, learned Counsel for the opposite party Nos. 2 to 7 submits that this application in the garb of second revision was not fit to be entertained and was fit to be rejected. He submits that the Code of Criminal Procedure does not envisage the filing of the second revision application and in which background the prayer made by the Petitioner through the present application is misconceived and is fit to be rejected.

13. Learned Counsel for the opposite parties further with reference to the order passed by the Sessions Judge, Saharsa impugned in the present application, more particularly paragraph 4, submits that no prejudice has been caused to the Petitioner who has all opportunity at his disposal to raise these issues at the stage of framing of charge or by invoking the provisions u/s 319 of the Code of Criminal Procedure in case any evidence comes to light against the discharged accused. He thus submits that no material purpose would be served in interfering with the order impugned in the present application for the reason that the interest-of Petitioner is protected under the impugned order.

14. Learned Counsel for the State also objects to the filing of the present application submitting that as the interest of the Petitioner stands protected

under the impugned order passed by the Sessions Judge, Saharsa, this application requires no indulgence.

15. I have perused the materials on record and have considered the rival submissions advanced on behalf of the contesting parties.

16. No doubt the order impugned passed by the Sessions Judge, Saharsa in Cr. Rev. No. 17 of 2001 dated 3.2.2001 in no uncertain terms protects the interest of the Petitioner to raise all issues at the stage of framing of charge as also in case evidences come to light enabling the Court below to take action u/s 319 of the Code of Criminal Procedure but then the said position was even otherwise available to the Petitioner and for that he did not require any liberty.

17. The only issue which requires consideration is whether the Petitioner was prejudiced at the stage of passing of the order dated 5.1.2001 by the Chief Judicial Magistrate, Saharsa. Undoubtedly, the Petitioner had filed the protest petition on drawing the attention of the Chief Judicial Magistrate as regarding the manner of investigation being carried by the Investigating Officer.

18. The moment the protest petition was filed it was incumbent on the part of the Chief Judicial Magistrate to have given an opportunity of hearing to the informant Petitioner before passing of the order dated accepting the final form/charge-sheet submitted by the Investigating Officer.

19. A perusal of the order passed by the Chief Judicial Magistrate as contained in Annexure-6 to this application shows that although the Chief Judicial Magistrate has taken note of the protest petition filed on behalf of the .Petitioner but the same has been rejected simply on grounds that charge-sheet had been submitted in the present case. The Chief Judicial Magistrate has after rejecting the protest petition proceeded to accept the final form/charge-sheet submitted by the Investigating Officer. The order passed by the Chief Judicial Magistrate in accepting the final form against the F.I.R. named accused and the charge-sheet against non-F.I.R. named accused, one of whom (Md. Akhlad) happens to be the son of the deceased and this Petitioner, definitely has prejudiced the interest of this Petitioner and who certainly deserved a hearing before the order taking cognizance was passed on 5.1.2001 by the Chief Judicial Magistrate, Saharsa. The defect so arising cannot be cured by hearing being given to the Petitioner at the stage of framing of charge and/or by invoking the provisions of Section 319 Code of Criminal Procedure.

20. I am tempted in this regard to reproduce the following lines of the judgment rendered by the Supreme Court in the case of Bhagwant Singh (supra).

4....There can therefore, be no doubt that when, on a consideration of the report made by" the officer incharge of a police station under Sub-section (2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submission to persuade the Magistrate to take cognizance of the

offence and issue process.

....We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop proceedings or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report....

21. In view of the position settled under the judgments relied upon by the learned Counsel appearing on behalf of the Petitioner, this Court would not detain itself in holding that the order taking cognizance dated 5.1.2001 passed by Chief Judicial Magistrate, Saharsa as contained in Annexure-6 and the order passed in Revision Case No. 17 of 2001 dated 3.2.2001 by the Sessions Judge, Saharsa cannot be sustained and both the orders are set aside and the matter is remitted back to the Chief Judicial Magistrate, Saharsa with a direction to proceed in accordance with law.

22. The application stands allowed.