
(2001) 10 OHC CK 0003

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 3205 of 1998

Murali Mohakur ' Mendidhar and Others

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 18-10-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 192, 200, 202, 202(1), 202(2)
Penal Code, 1860 (IPC) — Section 147, 149, 323, 341, 354

Citation : (2002) 93 CLT 357 : (2002) 1 OLR 326

Hon'ble Judges : P.K. Mohanty, J

Bench : Single Bench

Advocate : D.P. Dhal, P.K. Routray, A.R. Mohanty and P. Uttarkabat, for the Appellant; M.K. Badu, S.K. Nayak-3, P.K. Mishra and B.B. Routray, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Mohanty, J.—The petitioners call in question the order of cognizance dated 16.3.1998, passed by the learned S.D.J.M., Biramaharajpur in 1 C.C. No. 5 of 1996 in this petition u/s 482, Code of Criminal Procedure (hereinafter referred to as "the Code") and prayer is made for quashing of such order of cognizance.

2. The fact in brief is that opp. party No. 2 lodged a complaint in the court of learned S.D.J.M., Biramaharajpur as against the petitioners on allegation of having committed offences, punishable under Sections 147, 341, 323, 354, 427, 379, 447, 506/149 of the Indian Penal Code (in short "I.P.C."). The learned Magistrate, by order dated 7.8.1996, recorded the initial statement of the complainant u/s 200 of the Code and since it was found that the offences alleged are triable exclusively by the Court of Session, as required under law, he directed the complainant to produce all the witnesses named in the petition on 26.8.1996, for recording their statements u/s 202 of the Code. On that day, the statement of the husband of the complainant was recorded and the learned Magistrate having found that the complainant had lodged a written report against the accused-

petitioners in the local police station, called for a report from the police u/s 210 of the Code. On receipt of the police report, the learned Magistrate called upon the complainant to produce all her witnesses on the next day and on 24.2.1998 two more witnesses were examined and on 4.3.1998 recorded the statements u/s 202 of the Code of another witness produced by the complainant. On 16.3.1998, the learned Magistrate on perusal of the complaint petition and the statements recorded under Sections 200 and 202 of the Code, having found sufficient materials against the accused persons, took cognizance and directed issuance of summons and that order is sought to be questioned in the present petition.

3. The learned counsel for the petitioners submitted that since all the witnesses named in the complaint petition have not been examined nor a memo has been filed to the effect that the complainant has no more witnesses to be examined, the order of cognizance is bad in law and as such liable to be quashed. Secondly, it is contended that since a report u/s 210 Cr.P.C. was called for, from the police and the report was received, the learned Magistrate erred in law in not taking the report into consideration in which event, the cognizance could not have been taken. Thirdly, it is argued that there being no whisper in the order that the learned Magistrate has considered the reports u/s 210 of the Code, the order is vitiated in law and liable to be quashed. The learned counsel has cited certain decisions of this Court in support of his contention, which shall be referred to at the relevant point of time.

4. The learned counsel appearing for opp. party No. 2-Complainant, however, controverting the submissions made, submitted that the complainant having examined all her witnesses as she thought sufficient, there is no requirement of law that the complainant is bound to produce all the named witnesses in absence of which, the Magistrate cannot take cognizance even if a case is made out on such evidence. It is further submitted that, it is not the requirement of law that once a report u/s 210 of the Code is called for from the local police, the Magistrate is bound to act upon it and cannot take a different view on the basis of materials available with him. The learned counsel has also referred to certain decisions in support of his contention, which shall be dealt with and discussed at the appropriate time.

5. In order to appreciate the first contention the relevant provision may be noticed and considered.

Section 202 of the Code reads thus :

"202. Postponement of Issue of process : (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance of which has been made over to him u/s 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person, as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for

proceedings :

Provided that no such direction for investigation shall be made :

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath u/s 200.

(2) In an enquiry under Sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath.

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under Sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

Sub-section (1) of Section 202 Cr.P.C. empowers the Magistrate to postpone issue of process against the accused and to enquire into the case himself or direct an investigation to be made by a Police Officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. Under the proviso to Sub-section (2) thereof, the Magistrate, if he thinks fit, while conducting the enquiry under Sub-section (1) take evidence of witnesses on oath. The proviso to Sub-section (2) comes into operation where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, in which event he is obliged under law to call upon the complainant to produce all his witnesses and examine them on oath. The expression "all his witnesses" has been construed to mean "all the witnesses whom the complainant chooses to examine". When the complainant is given opportunity to produce witnesses, it is open to him to produce all or some of the witnesses, in the inquiry which he thinks sufficient.

Thus, the proviso to Sub-section (2) is relatable to cases exclusively triable by the Court of Session and it requires that if the Magistrate comes to a prima facie view that the offence complained of is triable exclusively by the Court of Session, he is to call upon the complainant to produce all his witnesses and examine them on oath. Section 203 of the code relates to provision for issue of process. It is thus clear that the examination of all witnesses as referred to under the proviso to Sub-section (2) of Section 202 of the Code would mean all witnesses produced by the complainant and is in addition to the witnesses, if any, examined u/s 200 and necessarily it is not mandatory requirement of the complainant to produce all the witnesses named in the complaint petition and that he does not have a choice to exclude any person, even if he finds that any such witnesses, who may have been gained over, has to be examined knowingly fully well that such

witnesses may spoil his case. It is always open to the complainant to choose his witnesses and exclude any person named as a witness, since he is the best judge to decide who are relevant witnesses to be examined. The consequences of such non-examination are to be considered by the Court during trial. But there is no statutory compulsion for the Magistrate to direct the complainant to examine all those named witnesses including the complainant.

The Division Bench of this Court in Charan Rout and Others Vs. Prafulla Kumar Mangaraj, have already laid down the law that the Magistrate under the proviso to Sub-section (2) of Section 202 of the code has no statutory obligation to call upon the complainant or all such witnesses named in the complaint petition, but what he is required to do, is to call upon the complainant to produce all his witnesses of his choice and examine them on oath. A Magistrate, who is competent and required to take cognizance cannot force the complainant to examine witnesses. Expression "Called upon" has been held to mean "require" or "direct". The Apex Court in Rosy and Another Vs. State of Kerala and Others, have held that where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, the direction of investigation by the Police Officer is not permissible and he is required to hold enquiry. During that enquiry he may decide to examine the witnesses on oath. At this stage, proviso further gives mandatory directions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, it is required to be committed to the Sessions Court for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by the complainant u/s 204(2) of the Code before issuance of process. The irregularity of non-compliance thereof would not vitiate the further proceeding in all cases. A person complaining of such irregularity should raise objection at the earliest date and he should point out how prejudice is caused or is likely to be caused by not following the proviso. In view of the conspectus of the decisions referred to above, the contention of the learned counsel that the complainant having not examined all the witnesses named in the complaint petition, the order of cognizance was bad in law, has to be rejected. The complainant is the best judge to choose his witness and it is not compulsory for him to produce all such witnesses named in the complaint petition. What is required is that he had to produce all the witnesses and to examine them on whom he claims that the case depends. Some other decisions have been cited at the bar, but, those having reiterated the view expressed in the decisions referred to above, it is not necessary to burden the judgment by discussing those.

6. The next submission of the learned counsel that the Magistrate having called for a report from the local police u/s 210 of the Code, it was incumbent on him to act upon it and in view of the report he should have dropped the proceeding, has to be rejected in limini. It is to be understood that only because a report is called for, the Magistrate is not obliged to accept the same but the report is for the

purpose, to satisfy the learned Magistrate to take a view one way or the other during enquiry under Sections 200 or 202 of the Code. In the case at hand, it needs to be observed that the learned Magistrate was not at all required to call for a report since there was nothing on record that the allegation, in respect of which the complaint petition is made is being investigated by the police. The perusal of a report submitted by the local police also would have led the learned Magistrate to find that the investigation that was being made by the police was in respect of a different offence based on the F.I.R. of the present petitioners. In such view of the matter and in view of the settled law that the Magistrate is not obliged to act upon and confine himself to the report, if called for u/s 210 of the Code, the contention is otherwise misconceived in law and has to be rejected.

7. In view of what has been held earlier, I find no merit in this application for quashing the order of cognizance passed by the learned Magistrate, and accordingly this petition is rejected. The learned counsel for the petitioners in course of hearing made a submission that alternatively if the Court holds, that the cognizance cannot be quashed, then a lenient view may be taken to pass an order for release of the accused-petitioners on bail. In an application u/s 482 of the Code, the High Court is not loathed with the power to pass an order for release on bail under Sections 438 or 439 of the Code when specific power is vested with the High Court for exercising power to grant bail under those provisions in an appropriate application. However, it is open to the accused petitioners to surrender in the trial court and apply for bail, in which event their bail application shall be considered on its own merit in accordance with law without being influenced by any of the observations made in this judgment.

8. This criminal Misc. Case petition u/s 482 Cr.P.C. is thus dismissed with the observation that the proceeding and the trial be expedited.