

(2001) 08 OHC CK 0038

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 4361 of 2000

Nabakishore Panda and Others

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 28-08-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 202(2), 203, 208, 482
Penal Code, 1860 (IPC) — Section 307, 328, 34, 448, 506

Citation : (2001) 2 OLR 402

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

Bench : Single Bench

Advocate : A.K. Mohapatra, K.N. Parida, M. Mishra and N.R. Rath, for the Appellant; N.C. Mishra and Rupesh Mohanty for opp. party No. 2 and Additional Standing Counsel for opposite party No. 1, for the Respondent

Judgement

P.K. Tripathy, J.—In this application u/s 482, of the Code of Criminal Procedure, 1973 (in short, "the Code"), the accused persons in I.C.C. No. 46 of 2000 of the Court of Judicial Magistrate First Class, Basudevpur, have prayed to quash the order dated 6.4.2000 by which learned J.M.F.C. after taking cognizance of the offences u/s 448, 323, 506, 307/34, I.P.C. has issued process of appearance of the accused persons.

2. Learned counsel for the petitioners argued that after institution of the complaint in the Court of S.D.J.M., Bhadrak. learned S.D.J.M. called for a report from the O.I.C., Basudevpur P.S. in accordance with the provision in Section 210 of the Code. Shortly thereafter the Court of J.M.F.C, Basudevpur being established the complaint was transferred to that Court on the ground of territorial jurisdiction. Learned counsel for the petitioners stated that learned J.M.F.C. without waiting for the report from the police, decided to conduct an enquiry u/s 202 of the Code and in furtherance thereof directed the complainant to produce her witnesses. On 6.4.2000 after examining three witnesses produced by the complainant, learned J.M.F.C. impliedly, concluded the enquiry and passed the impugned order. He thus argued that when the complainant had not declined

or refused to examine further witnesses and when the proviso to Sub-section (2) of Section 202 of the Code mandates the Magistrate to record the statement of all the witnesses produced by the complainant, therefore in this case the conduct of the learned J.M.F.C. in abruptly closing the enquiry and issuing process is contrary to the provision of law and therefore liable to be quashed.

3. Learned counsel appearing for the complainant/opposite party while not disputing to the aforesaid factual position advanced by the petitioners, argued that the matter be remanded for examination of further witnesses from the side of the complainant inasmuch as the complainant is willing to examine further witnesses. While fairly conceding to the correctness of the contention of the petitioners that the mandate of law in the proviso to Sub-section (2) of Section 202, of the Code obligates the complainant to produce all her witnesses or to give a statement or declaration if she does not want to examine any further witnesses or any particular witness. Learned counsel for the opposite party however argues that the complaint of non-examination of other witnesses was not at the instance of the complainant and therefore learned J.M.F.C. may be directed to take up the further enquiry.

4. In view of the aforesaid argument and the conceded factual and legal position, at the stage of disposal of the application u/s 482, Cr. P.C. reference was made to the case of Sangram Keshari Mishra v. Niranjana Senapati and others (2000) 18 OCR 764, in which the previous decisions of this Court were referred to and ratio was laid down relating to the mandatory nature of the enquiry in accordance with the proviso to Sub-section (2) of Section 202 of the Code and also explaining the meaning of the term "all his witnesses" and answering what is the method of conducting that enquiry when one of the offences complained of is exclusively triable by the Court of Session. At that stage it was seen that below the placitum-A in the said O.C.R. note has been given which reads as hereunder :

"A. CODE OF CRIMINAL PROCEDURE, 1973 - Sections 200, 202 and 208 - Proviso to Section 203(2) held to be mandatory - Magistrate bound to call upon the complainant to produce all his witnesses and examine on oath- In an offence exclusively triable by Court of Session offence being serious and pre-commitment enquiry being disposed with in the new Code, statements of witnesses and documents relied by prosecution are required to be furnished to accused to make him aware of materials against him - Hence to enable compliance with Section 208 at the time of commitment, recording of statements of witnesses is necessary. (Paras 8,9 and 10).

NOTE : See however (2000) 18 OCR (SC) 490 paras 24, 25, 43 and 45 where the Apex Court has held compliance of Section 202(2) Proviso in Sessions Triable Cases is not a must and would not vitiate further trial unless accused establishes prejudice being caused to him."

On a bare reading of that note impression may occur as if the ratio as noted in placitum-A is contrary to the decision of the Apex Court in the case of Rosy and

Anr. v. State of Kerala and others (2000) 18 OCR (SC) 490. That necessitates this Court to make a reference to the case of Rosy [supra] and to deal with the matter with a view to avoid any confusion which may occur in view of the above quoted note. At the outset it may be noted that after going through the case of Rosy [supra] this Court finds that so far as the legal position is concerned, the ratio in the case of Sangram [supra] does not run contrary to the ratio in the case of Rosy [supra]. On the other hand, the mandate of law has been discussed in different context, i.e., on different factual background and accordingly the ratio has been propounded in each of the cases interpreting the provision u/s 202 of the Code besides the other allied provisions.

5. It is appropriate to note that in the case of Sangram (supra) the order of cognizance was challenged, inter alia, on the ground of the complainant not examining all his witnesses named in the complaint and thereby violating the mandate of law in the proviso to Sub-section (2) of Section 202 of the Code. In that case admittedly three of the witnesses named in the complaint were not examined though five of the witnesses outside the list were examined in course of that enquiry and complainant made a statement not to examine any further witnesses in that enquiry. The contention of the petitioner that non-examination of those three witnesses was in violation of the mandatory provision of law in the Proviso to Sub-section (2) of Section 202 and for that the order of cognizance was liable to be set aside. In that case that contention was repelled and the term "all his witnesses" were discussed with reference to the other case laws and it was laid that, to produce all his witness means those witnesses whom the complainant chooses to examine. In the said case while considering the purpose behind the mandate of law in the proviso to Sub-section (2) of Section 202 of the Code, this Court made a reference to Sees. 208 and 209 read with Sections 200 and 202 of the Code and held that :

"However, if it appears to the Magistrate that the offence complained of is exclusively triable by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath. That aspect is made mandatory because of the fact that an offence exclusively triable by the Court of Session is a serious type of offence prescribing major penalty and the method of pre-commitment enquiry which had been provided in Chapter XVIII of Code of Criminal Procedure, 1898, (i.e. the Old Code) is not provided in the Code (new Code) whereas in accordance with the provision in Section 208 of the Code, statements of witnesses and documents relied upon by the prosecution are required to be furnished to the accused so as to make him aware of the material evidence available against him. In other words, the proviso to Sub-section (2) of Section 202 requires the Magistrate to call upon the complainant to produce all his witnesses to record their statements under oath so that if a prima facie case is made out, at the time of commitment u/s 209 the requirement of law u/s 208 of the Code can be properly complied with by giving all the evidence upon which the complainant relies in support of the allegations against the accused."

Another relevant thing in that case was that the complaint was not lodged by a public servant acting or purporting to act in due discharge of his official duties but by an individual.

6. In the case of Rosy (supra) the facts before Hon"ble Apex Court was that a complaint was instituted on 16.11.1990 by one Excise Inspector in his capacity as such regarding detection of methyl alcohol in arrack and the case was committed to the Court of Session without conducting enquiry in accordance with the relevant provision in Section 202 of the Code. Trial of the case was taken up at a belated stage because of intervening applications on different context pending adjudication in the High Court. After completion of the trial, at the stage of argument the defence counsel referring to a Full Bench and another Division Bench decision of the Kerala High Court, advanced an argument raising the question of illegality in commitment of the case without following the mandatory provision in Section 202 of the Code. Learned Sessions Judge made a reference to the High Court u/s 395(2) of the Code. The accused also preferred a revision challenging that order of the Sessions Judge. The Division Bench of the Kerala High Court on 7.6.1999 quashed the commitment order in that Sessions Case and directed the Magistrate to conduct enquiry in accordance with the proviso to Sub-section (2) of Section 202 of the Code. It is against that order that the Hon"ble Apex Court was approached by the appellant. While analysing the provision of law in that context the Apex Court recapitulated the essence of the procedural law as propounded in the case of *The State of Punjab and Another Vs. Shamlal Murari and Another*, where it was propounded by the Apex Court that -

"We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, the procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, Courts are to do justice, not to wreck his end product on technicalities. Viewed in this perspective, even what is regarded as mandatory traditionally may, perhaps have to be moderated into wholesome directions to be complied with in time or in extended time."

Though explaining the provision of law in different manner two different judgments have been written by the Hon"ble Judges of the Division Bench of the Apex Court, but Their Lordships are unanimous in their decision that the impugned order of the Kerala High Court was not in accordance with the mandate of law. Hon"ble Shri M. B. Saha, J. after making a threadbare discussion of the purpose and the provision in the proviso to Sub-section (2) of Section 202 of the Code and the allied provisions of law, has made a synopsis of the deliberation which reads as hereunder :

"Hence, what emerges from the above discussion is :

I. (a) u/s 200 Magistrate has jurisdiction to take cognizance of an offence on the complaint after examining upon oath the complainant and the witnesses present;

(b) When the complaint is made in writing by a public servant acting or purporting to act in discharge of his official duties, the Magistrate need not examine the complainant and the witnesses;

(c) In such case Court may issue process or dismiss the complaint.

(II) (a) The Magistrate instead of following the procedure stated above, may, if he thinks fit, postpone the issue of process and hold inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the person accused. Such inquiry can be held by him or by the police officer or by other person authorised by him.

(b) However, 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 inquiry by himself. During that inquiry he may decide to examine the witnesses on oath. At that 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, which 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 complainant u/s 204(2) before issuance of the process.

(c) The irregularity or non-compliance thereof would not vitiate the further proceeding in all cases. A person complaining of such irregularity should raise objection at the earliest stage and he should point out how prejudice is caused or is likely to be caused by not following the proviso. If he fails to raise such objection at the earliest stage, he is precluded from raising such objection later."

(Underlining has been done to put emphasis that placitum A in the case of Sangram is not contrary to the said ratio.)

7. Hon'ble Shri K. T. Thomas, J. as the Presiding Judge of the Bench, while agreeing with the conclusion, as quoted above, made an independent in-depth interpretation of the provision in Section 202 of the Code and held that :

"16. If a Magistrate is to comply with the aforesaid requirements in Section 208 of the Code (which he cannot obviate as the language used in the Sub-section is of any indication) what is the manner in which he can do it in a case where he failed to examine the witnesses before issuing process to the accused ? The mere fact that the word "or" is employed in Clause (1) of Section 208 is not to be understood as an indication that the Magistrate is given the freedom to dispense with the inquiry if he has already examined the complainant u/s 200. A case can be visualized in which the complainant is the only eye-witness or in which all the eye-witnesses were also present when the complaint was filed and they were all

examined as required in Section 200. In such a case the complainant, when asked to produce all his witnesses u/s 202 of the Code, is at liberty to report to the Magistrate that he has not other witness than those who were already examined u/s 200 of the Code; When such types of cases are borne in the mind it is quite possible to grasp the utility of the word "or" which is employed in the first clause of Section 208 of the Code. So the intention is not to indicate that the inquiry is only optional in the cases mentioned in Section 208."

Even referring to Sections 208 and 209 of the Code and the recommendation made by the Law Commission, His Lordship further observed that :

"24. Thus I have no doubt that the proviso incorporated in Sub-section (2) of Section 202 of the Code is not merely to confer a discretion on the Magistrate, but a compelling duty on him to perform in such cases. I wish to add that the Magistrate in such a situation is not obliged to examine witnesses who could not be produced by the complainant when asked to produce such witnesses. Of course if the complainant requires the help of the Court to summon such witnesses it is, open to the Magistrate to issue such summons, for, there is nothing in the Code which prevents the Magistrate from issuing such summons to the witnesses.

25. I reiterate that if the Magistrate omits to comply with the above requirement that would not, by itself, vitiate the proceedings. If no objection is taken at the earlier stage regarding such omission the Court can consider how far such omission would have led to miscarriage of justice, when such objection is taken at a later stage. A decision on such belated objection can be taken by bearing in mind the principles adumbrated in Section 465 of the Code."

8. The essence of the ratio in the aforesaid case is not to make "examination of witnesses" in such inquiry, discretionary at the option of the Magistrate but to propound that the criminal proceeding shall not stand vitiated in any and every case of failure to comply with that provision in Section 202 of the Code. In such cases objections should be raised at the earliest opportunity and the Court is to find out whether a case of prejudice is pleaded or available in that respect. Virtually that is the spirit behind that ratio though there has been a threadbare discussion about how an inquiry should be conducted in a case on the basis of a complaint disclosing offence exclusively triable by the Court of Session. Therefore, the above quoted "Note" below the placitum-A in the case of Sangram (supra) is incorrect if it has conveyed the idea that the ratio in the case of Sangram is contrary or inconsistent with the ratio in the case of Rosy (supra),

9. In the case at hand it is apparent from the impugned order that on receipt of the complaint and after recording the initial statement of the opposite party process was not issued against the petitioners but because of inclusion of the offence u/s 307, I.P.C., which is exclusively triable by the Court of Session, learned Magistrate decided to undertake an inquiry in accordance with the proviso to Sub-section (2) of Section 202 of the Code. One of the alleged

offences involved, i.e., Section 307, I.P.C. being exclusively triable by the Court of Session and as the complainant did not examine all her witnesses at the stage u/s 200 of the Code and since the complaint was not lodged by a public servant acting or purporting to act in the discharge of his official duty, therefore, learned Magistrate was duty bound to undertake the inquiry as prescribed in the Proviso to Sub-section (2) of Section 202 of the Code and under the given facts and the provision of law he was not left with any discretion to avoid such inquiry. Admittedly, learned Magistrate undertook that inquiry but did not complete it in proper manner inasmuch as he did not allow the opposite party to produce all her witnesses for their examination on oath. Hence, the procedure that was adopted by the learned Magistrate is not only whimsical but also arbitrary and illegal. Apart from that, the accused/petitioners at the earliest opportunity have challenged the same by filing the present application u/s 482 of the Code. Prejudice to the petitioners is apparent in view of not making available statements of all the witnesses of the complainant at the stage of compliance of Sections 208 and 209 of the Code. "All the witnesses" has to be understood as has been defined and interpreted in the cases of Rosy (supra) and Sangram (supra).

10. The aforesaid analysis of the facts and law clearly surface illegality in the impugned order and hence for the ends of justice this Court invokes the inherent power and quash the order of issue of process against the petitioners. Accordingly the Criminal Misc. Case is allowed.

Since the said lacuna does not vitiate the criminal proceeding and the complainant/opposite party is willing to examine her further witnesses or to make appropriate declaration, therefore the case is remitted back with a direction to the Court below to undertake the further inquiry from the stage where it was closed by him on 6.4.2000. Inquiry be conducted expeditiously and completed, as far as practicable, within a period of two months from the date of receipt of a copy of this order. If the complainant shall fail or cause unreasonable delay in producing her witnesses or making appropriate declaration, then learned Magistrate shall be at liberty to close the inquiry and to pass appropriate order in accordance with law.

Send a copy of this order to the Court below immediately.