

(2016) 12 OHC CK 0031
In the Orissa High Court
Case No : Crl. Mc. No. 1190 of 2010

Rabindra Kumar Biswal

APPELLANT

Vs

Santilata Mohapatra

RESPONDENT

Date of Decision : 07-12-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Dowry Prohibition Act, 1961 — Section 4
Penal Code, 1860 (IPC) — Section 304B, Section 34, Section 498A

Citation : (2017) 1 DMC 607 : (2017) 66 OrissaCriR 31

Hon'ble Judges : Mr. S.K. Sahoo, J.

Bench : Single Bench

Advocate : Mr. Bigyan Kumar Sharma, K.K. Mohapatra and B. Panda, Advocates, for the Petitioner; Mr. Satrugan Swain, P. Das, S. Das and J. Pattnaik, Advocates, for the Opposite Party; Mr. Deepak Kumar, Addl. Standing Counsel, for the State of Orissa

Final Decision : Disposed Off

Judgement

S.K. Sahoo, J.—In this application under section 482 of Cr. P.C., the petitioner Rabindra Kumar Biswal has prayed for quashing the impugned order dated 23.12.2009 passed by the learned S.D.J.M., Kendrapara in I.C.C. No.343 of 2008 in taking cognizance of offences punishable under sections 498-A, 302 read with section 34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act and issuance of non-bailable warrant of arrest against him.

2. The prosecution case, as per the complaint petition filed by the opposite party Santilata Mohapatra is that she had given the marriage of her daughter Madhusmita @ Pinki (hereafter "the deceased") with accused Sunil Biswal on 13.12.1996. At the time of marriage, as per the demand of the accused persons namely Sunil Biswal, his brothers Rabindra Kumar Biswal (petitioner) and Rakesh Biswal, his mother Bijuli Biswal and his sister Nandi Biswal, the complainant gave cash of Rs.5,00,000/- (rupees five lakhs) and also demand draft of Rs.1,00,000/- (rupees one lakh) towards the purchase of Tata Sumo Car and further gave other

articles including gold ornaments to the deceased and her husband. The couple was blessed with two sons namely, Aryan Biswal and Ayusman Biswal. It is the further case of the complainant that few months after marriage, there was further demand of Rs.2,00,000/- (rupees two lakhs) by the accused persons and since such demand could not be fulfilled, the deceased was subjected to physical and mental torture by the accused persons. The deceased was being compelled by the accused persons to contest the Gram Panchayat election and accordingly, she contested the election and got elected as Sarpanch. Since the deceased did not agree to misuse her power as Sarpanch to provide wrongful gain to the accused persons, she was subjected to further torture. On 29.07.2008 the deceased came to her father's place and complained against her in-laws before her family members regarding apprehension of danger to her life. The complainant took the deceased to the rented house of the accused persons on 31.07.2008 and left her there requesting the accused persons not to torture the deceased but on the very next day i.e. on 01.08.2008 the complainant received message over telephone that the deceased had sustained burn injuries and was on the way to S.C.B. Medical College and Hospital, Cuttack. On getting such message, the complainant and other relatives rushed to the Hospital and found the deceased lying with burn injuries over her entire body and she was struggling for life. The accused persons had left the deceased alone in the hospital without any arrangement and on 03.08.2008 night, the deceased expired. The post-mortem was conducted on the next day and dead body was cremated.

It is the further case of the complainant that the son of the deceased namely, Aryan Biswal disclosed that he had seen his mother being assaulted by the accused persons and she was crying helplessly and when he asked the reason for such assault, he was forcibly kept aside from the spot.

It is further stated in the complaint petition that after completion of obsequies ritual, the complainant came to Kendrapara Police Station on 20.08.2008 with her husband and submitted a written report which was not registered and false assurance was given by Kendrapara police that after getting medical documents from Cuttack Hospital, they would take steps against the accused persons and on 21.09.2008 the complainant was told by the police that no case has been registered and was further told to take shelter in the Court of law.

3. Initially the complainant filed a complaint petition vide I.C.C. Case No.266 of 2008 on 23.09.2008 and when the case was posted for enquiry under section 202 of Cr. P.C. after recording of initial statement of the complainant, due to non taking of steps on account of illness of the conducting counsels, the complaint petition was dismissed on 05.11.2008 and accordingly, the second complaint petition was filed in connection with which the impugned order was passed.

4. The learned Magistrate recorded the initial statement of the complainant-opposite party and five witnesses were examined during inquiry contemplated under section 202 of Cr. P.C. and on perusal of the complaint petition, statements of the complainant and the witnesses, the Magistrate found prima facie materials

against the petitioner and other co-accused persons and accordingly, passed the impugned order.

5. Mr. Bigyan Kumar Sharma, learned counsel for the petitioner while challenging the impugned order contended that Kendrapara P.S. Case No.267 of 2008 was registered on 03.09.2008 at the instance of the complainant-opposite party and by the time the complaint petition was filed, the investigation of Kendrapara P.S. Case No.267 of 2008 was under progress and statements of thirteen witnesses had already been recorded. The learned Magistrate without following the procedure laid down under section 210 of Cr. P.C. which is mandatory in nature, proceeded with the complaint petition and passed the impugned order. He further contended that in absence of non-compliance of the provision i.e. calling for a report on the matter from the police officer conducting the investigation and staying the inquiry in the complaint case proceeding as contemplated under section 210 of Cr. P.C., the order of taking cognizance and issuance of process is vitiated in the eye of law. The learned counsel further submitted that the petitioner is distantly related to the husband of the deceased and from the averments made in the complaint petition as well as the initial statement of the complainant and the other statements collected during course of inquiry, no prima facie case for commission of offence under section 304-B of the Indian Penal Code against the petitioner is made out. It is further contended that in a complaint case, at the first instance, the learned Magistrate should not have directly issued non-bailable warrant of arrest without following the ratio laid down in case of *Inder Mohan Goswami v. State of Uttaranchal* reported in (2008) 39 Orissa Criminal Reports (SC) 188.

Mr. Satrugan Swain, learned counsel for the opposite party on the other hand contended that the complainant was not aware about the investigation of the police case and she has categorically mentioned in the complaint petition that though the police at Kendrapara Police Station on 20.08.2008 reluctantly received the written report from her but did not take any steps nor registered the case against the accused persons and when the complainant approached the police officials to know about the fate of her written report, the police took some plea and gave assurance to the complainant and her husband and the complainant was expecting that the police officials would take steps against the accused persons but ultimately on 21.09.2008, the complainant and her husband were told that no case has been registered and the police asked the complainant to take shelter in the Court of law. It was contended that when there was no material before the Magistrate while conducting inquiry in the complaint case that an investigation by police is in progress in relation to the offence which was the subject matter of the inquiry held by him, the question of staying the complaint case proceeding and calling for a report on the matter from the police officer as provided under section 210(1) of Cr. P.C. does not arise. It is further contended that the petitioner is none else than the elder brother-in-law of the deceased being the elder brother of the husband of the deceased and section 304-B of the Indian Penal Code is applicable to the husband or any relative of the

husband of the deceased and therefore, the contention raised by the learned counsel for the petitioner that the petitioner being distantly related to the deceased, the ingredients of the offence under section 304-B of the Indian Penal Code is not applicable to the petitioner cannot be accepted. He further contended that the averments made in the complaint petition, initial statement of the complainant and the statements of the witnesses recorded under section 202 Cr. P.C. clearly make out prima facie case against the petitioner and therefore, it is not a fit case to invoke the inherent power under section 482 of Cr. P.C. to interfere with the impugned order.

Mr. Deepak Kumar, learned counsel for the State produced the case diary and submitted that the complainant had made similar accusations against the accused persons including the petitioner in the first information report, on the basis of which Kendrapara P.S. Case No. 267 dated 03.09.2008 was registered against four accused persons and after completion of investigation, charge-sheet was submitted against the husband of the deceased namely Sunil Biswal on 30.11.2013 for offences punishable under sections 498-A, 306 and 406 of the Indian Penal Code. The learned counsel for the State contended that there is nothing on record that free copy of the F.I.R. was given to the opposite party as required under section 154 (2) of Cr. P.C. but the case diary reflects that the statements of the opposite party and her husband were recorded during course of investigation. Learned counsel for State while supporting the learned counsel for the opposite party contended that there is no illegality or impropriety in the impugned order passed by the learned Magistrate and therefore, the CRLMC application should be dismissed.

6. Section 210 Cr. P.C. provides the procedure to be followed when there is a complaint case and police investigation in respect of the same offence. Sub-section (1) of section 210 provides that when in a case instituted otherwise than on a police report, namely, a complaint case, the Magistrate is informed during the course of inquiry or trial that an investigation by the police is in progress in relation to the offence which is the subject matter of inquiry or trial held by him, the Magistrate is required to stay the proceedings of such inquiry or trial of the complaint case and to call for a report on the matter from the Police Officer conducting the investigation.

In a complaint petition, the format which has been given under Rule 20 of the G.R.C.O. (Criminal) of High Court of Judicature, Orissa, column no.6 prescribes that the complainant has to mention whether any information was given at the police station and if so, the action taken thereon. If the complainant has not indicated regarding lodging of any F.I.R. relating to the self same matter before the police station or the status of the case and the Magistrate also does not get any such information, it is not expected from the Magistrate to call for a report from the police station to ascertain as to whether any F.I.R. has been lodged and if so, what is the status of the case. If a report has been given but it has not been registered in the police station or even if registered, no progress in the

investigation has been made then the complainant has to mention it clearly in his complaint petition about the correct position. Obviously if the police investigation is not under progress or it has been completed and final form has been submitted then question of staying the proceedings of the complaint case does not arise. Mere statement in the complaint case that information was lodged with police would not be sufficient to stay the complaint case proceeding by the Magistrate unless it appears to him that the investigation is under progress in relation to the offence.

The word "appears" does not mean a remote possibility or every vague doubt arising in a skeptical mind. It is a strong word. In its dictionary sense, it means to be clear in mind, to be obvious or evident, to be manifest, to come forth into view, to become visible, to come out. It presupposes something apparent and telltale. The use of word "appears" is of substance and it means when the Magistrate prima facie finds or forms an opinion.

In the present case the complainant-opposite party has mentioned in column no.6 that on 20.08.2008 at about 4.00 p.m., the complainant along with her husband went to Kendrapara Police Station and presented the written report. Although the police received the written report but did not register a case and delayed the matter on false assurance and ultimately on 21.09.2008 told that no case has been registered and advised the complainant to take shelter in the Court of law. In paragraph 13 of the complaint petition, it is mentioned that the complainant and her husband went to Kendrapara Police Station on 20.08.2008 at about 4.00 p.m. and submitted written report which was reluctantly received by the police but no steps were taken to register the case. Thereafter whenever the complainant and her husband came to Kendrapara Police Station to know about the fate of their written report, the police by false plea delayed the matter and gave assurance to take legal steps after receipt of the U.D. case records and medical documents from Mangalabag Police Station and the complainant believed the assurance of the police but ultimately on 21.09.2008 the complainant and her husband were told by Kendrapara police to take shelter in the Court of law. In the initial statement, the complainant has stated that on 20th she lodged F.I.R. but police did not take any action. The husband of the complainant was examined during inquiry under section 202 of Cr. P.C. and he stated that F.I.R. was lodged by his wife but no action was taken thereon. The complainant examined herself during inquiry under section 202 of Cr. P.C. and she stated that on completion of the obsequies ceremony of her deceased daughter, she came to Kendrapara Police Station and lodged F.I.R. but no action was taken for which he came to Court.

Thus during course of the inquiry in the complaint case, there was no material available on record before the Magistrate that the F.I.R. submitted by the complainant-opposite party was either registered or an investigation by the police was in progress in relation to the offence which was the subject matter of the inquiry conducted by him. Therefore, there was no occasion for the

Magistrate to stay the proceeding of such inquiry and to call for a report on the matter from the police officer conducting the investigation.

In view of the aforesaid discussion, the contentions raised by the learned counsel for the petitioner that for noncompliance of the mandatory provision under section 210 of Cr. P.C., the order of taking cognizance and issuance of process is vitiated in the eye of law cannot be accepted.

7. The learned counsel for the petitioner further contended that the petitioner being distantly related to the husband of the deceased and absence of prima facie case against him, the ingredients of the offence under section 304-B of the Indian Penal Code are not attracted. It is the contention of the learned counsel for the petitioner that though the petitioner was the natural son of Kinu Charan Biswal who was the father-in-law of the deceased but soon after his birth in 1955, he was adopted by Harekrushna Biswal who happens to be the brother of Kinu Charan Biswal. It is further submitted that in all the documents like H.S.C. certificate, Voter Identity Card and PAN Card, the petitioner has been described as the son of Harekrushna Biswal. It is further submitted that the petitioner never stayed at his native place where the occurrence took place and since 2006, he was staying at Bhubaneswar.

I find from the materials available on record that the petitioner being the elder brother of the husband of the deceased is closely related to the deceased. The plea of adoption of the petitioner by Harekrushna Biswal is not borne out of the complaint case records. There is no dispute that the offence under section 304-B of the Indian Penal Code is applicable to the husband of the deceased or any relative of her husband. The term "relative" has not been defined in the Indian Penal Code. Section 2(t) of the Mental Health Act, 1987 defines "relative" as follows: "relative" includes any person related to the mentally ill person by blood, marriage or adoption. As per the Oxford Dictionary, the word "relative" means: "a person connected by blood or marriage." As per the Webster's Dictionary, the word "relative" means : "having relation to or bearing on something; close in connection; pertinent; relevant; not absolute or existing by itself: depending on or incident to something also; something considered in its relation to something else; a person connected by blood or affinity, esp. one allied by blood; a kinsman or kinswoman."

In case of *U. Suvetha v. State* by Inspector of Police reported in (2009) 43 Orissa Criminal Reports (SC) 512, while considering the term "relative of husband of a woman" within the meaning of section 498-A of the Indian Penal Code, it was held that in the absence of any statutory definition, the term "relative" must be assigned a meaning as is commonly understood. Ordinarily it would include father, mother, husband or wife, son, daughter, brother, sister, nephew, niece, grandson or granddaughter of an individual or the spouse of any person. The meaning of the word "relative" would depend upon the nature of the statute. It principally includes a person by blood, marriage or adoption. It is further held that the word "relative" brings within its purview a status. Such a status must be

conferred either by blood or marriage or adoption.

In case of *Shriram Pandey v. State of Madhya Pradesh* reported in 2013 (2) Chhattisgarh Law Judgments 43, it was held that a non-relative can neither be prosecuted nor punished under section 498-A of the Indian Penal Code or section 304-B of the Indian Penal Code but he can be prosecuted and punished for abetting a crime under section 498-A and 304-B of the Indian Penal Code.

Therefore, in view of the relationship between the petitioner and the deceased, it cannot be said that he is a complete stranger to the deceased. The petitioner is related to the husband of the deceased by blood and as such in view of the nature of accusations made against him relating to subjecting the deceased to cruelty in connection with the demand of dowry, I am of the view that prima facie ingredients of the offence under section 304-B of the Indian Penal Code is squarely applicable against the petitioner.

8. In the light of the aforesaid discussions, I am of the considered view that there is no illegality or impropriety committed by the learned S.D.J.M., Kendrapara in taking cognizance of the offence under section 498-A, 302 read with section 34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act and issuing process against the petitioner.

However, in view of the ratio laid down in the case of *Inder Mohan Goswami v. State of Uttaranchal* reported in (2008) 39 Orissa Criminal Reports (SC) 188, issuance of non-bailable warrant of arrest at the first instance in a complaint case against the petitioner is not sustainable in the eye of law and accordingly, the same is set aside. The learned S.D.J.M., Kendrapara is directed to issue summons to the petitioner for appearance in the complaint case and if the petitioner avoids the summons, the learned Magistrate, in the second instance shall issue bailable warrant against the petitioner and if the learned Magistrate, in the third instance, is fully satisfied that the petitioner is avoiding the Court's proceeding intentionally, he shall issue non-bailable warrant of arrest against the petitioner.

9. Accordingly, while not interfering with the impugned order of taking cognizance, I direct the learned S.D.J.M., Kendrapara in I.C.C. Case No.343 of 2008 to issue summons to the petitioner at the first instance for appearance and then follow the procedure as laid down in paragraph-8 above.

In the result, the CRL MC application is disposed of with the aforesaid observations.