
(1988) 05 PAT CK 0055
In the Patna High Court

Ramesh Chandra

APPELLANT

Vs

State of Bihar and Another

RESPONDENT

Date of Decision : 12-05-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190, 192, 2, 201, 202

Citation : (1989) CriLJ 476 : (1989) PLJR 317

Hon'ble Judges : Bhuvaneshwar Prasad, J

Bench : Single Bench

Judgement

Bhuvaneshwar Prasad, J.—This is an application u/s 482 of the Code of Criminal Procedure, 1973 (hereinafter called the "Code"). It is directed against the entire proceedings pending against the petitioner before the Judicial Magistrate, 2nd Class, Muzaffarpur, in Case No. C 332/827 Trial No. 2531 of 1983 including the order dated 4-7-1983 passed by the learned Chief Judicial Magistrate, Muzaffarpur and also the order dated 9-9-1983 passed by the learned Sessions Judge, Muzaffarpur.

2. It appears that opposite party 2, Anup Sah had lodged the first information report before the Sadar Police Station, Muzaffarpur to the effect that he had purchased six bags of wheat weighing five quintals eighty K.G. for Rs. 1008.60 paise and was bringing the same on two tempos. When he reached near the flour mills south of zero mile at about 1 p.m. the petitioner stopped him and told him that he would not allow the goods to be carried away since the opposite party 2 owed him some money. To this opposite party 2 replied that there was no arrear with him. In spite of this, it is alleged that the petitioner carried away the goods from two tempos. Accordingly, the Sadar P. S. Case No. 14 dated 15-10-1980 u/s 379 of the Indian Penal Code was instituted against the petitioner. In this case final report was submitted by the Sadar Police Station against the petitioner which was received by the learned Chief Judicial Magistrate on 8-8-1981. However, opposite party 2 had filed a protest petition which was heard on 7-4-1982. The learned Chief Judicial Magistrate examined opposite party 2 on

solemn affirmation and he directed Shri A. K. Singh "Kant" Executive Magistrate, Muzaffarpur for enquiry u/s 202 of the Code, This report u/s 202 of the Code along with the statement of. the witnesses examined by the learned Executive Magistrate was received by the learned Chief Judicial Magistrate, on the basis of which he found a prima facie case u/s 379 of the Penal Code made out against the petitioner. Accordingly, by his order dated 4-7-1983 he took cognizance of the offence against the petitioner u/s 379 of the Penal Code and transferred the case to the file of Shri H. L Singh, Judicial Magistrate, 2nd Class for disposal.

3. Against the aforesaid order dated 4-7-1983 the petitioner preferred a revision application before the learned Sessions Judge, Muzaffarpur who was pleased to reject the same by his order dated 9-9-1983.

4. It has been contended that the order of the learned Chief Judicial Magistrate dated 4-7-1983 taking cognizance of the offence u/s 379 of the Penal Code is illegal, without jurisdiction and bad in law. It is in contravention of the express mandatory provision of Section 202(1) of the Code as under law the enquiry can be held only by the Chief Judicial Magistrate himself and not by any Judicial Magistrate and not even by the Executive Magistrate. The order dated 9-9-1983 passed by the learned Sessions Judge in Criminal Revision No. 86 of 1983 is also equally bad in law as it has been passed in contravention of the mandatory provisions of Section 201(1) of the Code. No offence u/s 379 of the Penal Code is made out against the petitioner. The order dated 4-7-1983 passed by the learned Chief Judicial Magistrate taking cognizance of the offence against the petitioner has been passed mechanically without the application of the mind. On these grounds it was contended that the impugned order dated 4-7-1983 passed by the learned Chief Judicial Magistrate, Muzaffarpur as well as order dated 9-9-1983 passed by the learned Sessions Judge, Muzaffarpur be quashed

5. The only point for decision before me is whether this application is fit to be allowed or not.

6. At the time of the hearing some important questions of law have been raised by Shri Tetarwe, learned Counsel appearing on behalf of the petitioner. Since the questions raised by him are of considerable legal importance I would like to deal with them in detail.

7. At the out set Shri Tetarwe, the learned Counsel appearing on behalf of the petitioner, has drawn my attention to the order dated 23-4-1982 passed by the learned Chief Judicial Magistrate, Muzaffarpur. From this order it appears that the learned Chief Judicial Magistrate had examined the informant, Anup Sah (opposite party 2) on solemn affirmation. Thereafter he has proceeded to observe as follows:

Let a copy of the protest petition on being at once filed by the informant has sent to Shri A. K. Singh Kant, Executive Magistrate, Muzaffarpur for enquiry u/s 202 of the Code and report dated 3-5-1982.

8. The learned Counsel for the petitioner has submitted that this order could not have been passed by the learned Chief Judicial Magistrate in terms of Section 202 of the Code. In this connection, he has drawn my attention to this section, the relevant portion of Sub-section (1) of Section 202 of the Code runs as follows:

Section 202(1). Postponement of issue of process - Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or 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 proceeding.

On behalf of the petitioner it has been submitted that in terms of this sub-section the Magistrate taking cognizance of an offence can 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 any other person as he thinks fit. Before proceeding any further it will be useful to refer to the definition of "inquiry" and "investigation" as mentioned in the Code.

9. "Inquiry" has been defined in Section 2(g) of the Code as follows:

2(g). "Inquiry" means every inquiry, other than a trial, conducted under the Code by a Magistrate or Court.

The word "investigation" has been defined in Section 2(h) as follows:

2(h). "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf.

10. Referring to the definition of inquiry and investigation as mentioned above Shri Tetarwai has submitted that in terms of Section 202(1) of the Code either the learned Chief Judicial Magistrate should have held the inquiry himself or should have ordered for an investigation by any other person except a Magistrate, since according to him a Magistrate cannot hold an investigation as per the definition of investigation mentioned above. On these grounds he has submitted the impugned order is not in terms of Section 202(1) of the Code and is, therefore, liable to be quashed.

11. This contention of the learned Counsel has been seriously challenged by the learned A. P. P., Shri Staya Narain Prasad. Since it raises an important question of law, I would like to examine it in detail.

12. No doubt, in terms of Section 202(1) of the Code the Magistrate taking cognizance of the offence can postpone the issue of process against the accused and can hold an inquiry himself. In the alternative, he can order an investigation to be made by a police officer or by such other persons as he thinks fit. Accordingly, it has been submitted that in terms of this section whenever the

Magistrate taking cognizance of the offence wants an inquiry to be held he has to hold it himself. If he wants somebody else to inquiry into the matter he has to order for an investigation to be made by him. In other words, it has been submitted that the Magistrate taking cognizance of the offence cannot direct another Magistrate to hold an inquiry u/s 202 of the Code. Since in terms of this section the inquiry has to be made by the Magistrate taking cognizance of the offence himself and if he asked another person to inquire into the matter that will amount to an investigation within the meaning of Section 2(h) of the Code. In a situation like this it has been submitted that the magistrate taking cognizance of the offence cannot order for an inquiry or investigation to be made by another Magistrate.

13. In support of his contention the learned Counsel has placed reliance on the case of Asoke Chatterjee Vs. Sm. Manisha Mukherjee, in which it was held that from the definition of "investigation" given in Section 2(h) it would appear that a Magistrate, when he postpones the issue of process, cannot direct a further enquiry by another Magistrate. He can make a further enquiry into the case himself or can send it for investigation to a police officer or to any other person. From the facts of that case it would appear that a complaint petition was filed before the learned Chief Metropolitan Magistrate, Calcutta who examined the complainant and her mother on solemn affirmation and directed the Deputy Commissioner of Police to make a personal enquiry and submit a report. The Police report, however, did not support the case of the complainant. On an application filed by the complainant the learned Chief Metropolitan Magistrate rejected the enquiry report submitted by the police and directed a Metropolitan Magistrate to make an inquiry into the allegations of the complaint petition. It was, accordingly, held that a Magistrate when he postpones the issue of process cannot direct a further enquiry by another Magistrate,

14. On behalf of the petitioner reliance has also been placed on the case of Uma Kant Dubey v. Bhannu Bhuiyam 1975 BBCJ 388. This is a single Bench decision of this Court. It appears that a complaint petition was filed before the Sub-Divisional Judicial Magistrate who examined the complainant on solemn affirmation and made over the case for enquiry to another Judicial Magistrate without passing any order u/s 192 of the Code. It further appears that in this case also the learned Sub-Divisional Judicial Magistrate after examining the complainant on solemn affirmation had firstly sent the case for investigation to a police officer who submitted a report which was found to be perfunctory. The complainant also filed a petition against the investigation by the police. Accordingly the learned Sub-Divisional Judicial Magistrate directed the case to be sent to a Judicial Magistrate, 1st Class, to hold enquiry into the matter and to submit the report. On the basis of this enquiry report, the learned Sub-Divisional Judicial Magistrate passed the impugned order directing issuance of warrant of arrest against the petitioner. This order was quashed by the Court.

15. From these two decisions, however, it would appear that the learned

Magistrate taking cognizance of the offence had postponed the issue of process to the accused and had directed another Judicial Magistrate to hold an inquiry into the matter. It was held that in terms of Section 202(1) of the Code the Magistrate taking cognizance of the offence cannot direct another enquiry to be held by a Judicial Magistrate. In this background the important question that arises for consideration is whether or not an investigation can be ordered to be held by a person who is not a Judicial Magistrate even if he happens to be an Executive Magistrate.

16. In this connection, I could not again refer to the definition of "enquiry" and "investigation" as given in Sections 2(g) and 2(h) of the Code. So far as the inquiry is concerned, it has always to be conducted by a Magistrate or a Court. So far as investigation is concerned, it can be conducted by any person "other than a Magistrate". Now the question that arises for consideration is whether the expression "other than a Magistrate" will bring within its sweep an Executive Magistrate also. If it does not cover the cases of an Executive Magistrate it will naturally follow that Executive Magistrate cannot be ordered to hold an investigation in the matter in terms of 8.202(1) of the Code.

17. In this connection, it would be useful to refer to Section 3 of the Code. The relevant portion of this section runs as follows:

Construction of references- (1) in this Code-

(a) any reference, without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires,-

(i) in relation to an area outside a metropolitan area, as a reference to a Judicial Magistrate.

If this provision of law is taken into account the expression "other than a Magistrate" used to in Section 2(h) will naturally mean that it refers only to a Judicial Magistrate and not to an Executive Magistrate. From this it would naturally follow that an investigation can be held by an Executive Magistrate but it cannot be held by a Judicial Magistrate, In the present case the learned Chief Judicial Magistrate has referred the matter to an Executive Magistrate for an inquiry u/s 202 of the Code. On behalf of the State as also on behalf of opposite party 2 it has been contended that the word "inquiry" used in the order dated 23-4-1982 is an accidental error since the Executive Magistrate can, at best, hold an investigation u/s 202 of the Code. Moreover, it would submit that the law does not permit an inquiry to be held by any other person except the Magistrate taking cognizance of the offence. In this view of the matter, it has been submitted that the order dated 23-4-1982 passed by the learned Chief Judicial Magistrate should be interpreted to mean that he ordered the Executive Magistrate to hold an investigation u/s 202 of the Code. If this argument of the learned A.P.P, is accepted as correct, it is clear that the learned Chief Judicial Magistrate was authorised u/s 202(1) of the Code to order an investigation to be made by any other person including an Executive Magistrate and there was no

legal bar to passing of any such order. The question is whether simply by Using the word "inquiry" in this order the learned Chief Judicial Magistrate has committed illegality or irregularity so as to vitiate the entire proceeding. The learned A.P.P, has submitted that under the facts and circumstances of the case there is no alternative but to hold that the entire proceeding cannot be said to be vitiated simply by using the expression "inquiry" in place of investigation in the order, since according to him the true import of the order was that the learned Chief Judicial Magistrate had postponed the issue of process and had desired an investigation to be made by the Executive Magistrate. It was further pointed out by him that the Executive Magistrate had submitted the report in terms of Section 202 of the Code whereupon the learned Chief Judicial Magistrate had taken the cognizance of the offence. Under these circumstances, I feel inclined to agree with the learned A.P.P. so far as this submission is concerned.

18. In this connection, a reference may be made to the case of Sukhdeo Tiwari and Others Vs. State of Bihar, This is a single Bench decision of this Court in which the term "Magistrate" came up for interpretation in the background of Sections 3(3), 190(2) and 209 of the Code. It was held that the term "Magistrate" means only Judicial Magistrate. Though I feel that instead of referring to Section 3(3) of the Code which relates only to enactments passed before the commencement of this Code, it would have been better, if a reference to Section 3(1)(a) of the Code should have been made. The fact, however, remains that the view taken by me as mentioned above in connection with the expression "other than a Magistrate" used in Section 2(h) of the Code finds support from this decision.

19. The learned A.P.P. has also taken a plea that this application should be treated to be a subsequent application for revision u/s 397 of the Code and. therefore, the bar of Section 397(2) of the Code will apply against it. notwithstanding the fact that it has been shown to be filed u/s 482 of the Code. In this connection a reference may be made to the case of Madhu Limaye Vs. The State of Maharashtra, . In this case the Hon"ble Supreme Court has laid down principles in relation to the exercise of the inherent power of the High Court. It was held that on a plain reading of Section 482 it would follow that nothing in the Code (which would include Sub-section (2) of Section 397 of the Code also) "shall be deemed to limit or affect the inherent powers of the High Court", It was further held that the bar . provided in Sub-section (2) of Section 397 of the Code operates only in exercise of revisional power of the High Court meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one or the other principles, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. If the impugned order brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary then nothing contained in Section 397(2) of the Code can limit or affect the exercise of the inherent power by the High Court. But such cases

would be few and far between. The High Court must exercise inherent power very sparingly. From this decision it appears, that in all cases the petition u/s 482 of the Code is not barred even if a revision petition filed before the learned Sessions Judge is rejected. The High Court feels that the impugned order brings about a situation which is an abuse of the process of the Court or that for securing the ends of justice interference by the High Court is called for. Thus, under the facts and circumstances of this case. I do not find much force in this contention of learned A.P.P.

20. This view finds support from the case of Raj Kapoor and Others Vs. State and Others, . In this decision also it has been held that the inherent power of the High Court u/s 482 of the Code does not stand repelled when the revisional power u/s 397 overlaps. Nothing in the Code. not even Section 397 can affect the amplitude of the inherent power preserved in so many terms by the language of Section 482. The decision in this case of Madhu Limaye Vs. The State of Maharashtra, has been followed and affirmed in this decision also,

21. From the detailed discussions made above, it becomes clear to me that there is no merit in this miscellaneous application which is fit to be dismissed, it is, accordingly, dismissed and the order of stay passed by this Court on 1-11-1983 also stands automatically vacated. The learned trial Court is directed to dispose of this case as soon as possible since already there has been sufficient delay in the matter.