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**(2002) 01 OHC CK 0024**

**In the Orissa High Court**

**Case No :** Criminal Miscellaneous Case No. 1673 of 1999

Sanatan Swain and Others

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

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**Date of Decision :** 07-01-2002

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 482

**Citation :** (2002) 93 CLT 698 : (2002) 93 CLT 696

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

**Bench :** Single Bench

**Advocate :** R.K. Nayak, C.R. Swain and B. Mohanty, for the Appellant; Additional Government Advocate, D.P. Dhal, D.K. Das and M.K. Dash, for the Respondent

**Final Decision :** Allowed

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## Judgement

P.K. Tripathy, J.—Petitioners are the accused persons in I.C.C. No. 19 of 1998 of the Court of J.M.F.C., Kodala. They pray to invoke the inherent power and to quash the impugned order dated 3.12.1998 by which learned J.M.F.C. not only took cognizance of the offence u/s 395, I.P.C. but also issued process against the petitioners in accordance with the provision u/s 204, read with Section 87, Cr.P.C.

2. Learned counsel for the petitioners placed the fact in the following manner:

One Lochan Parida, the brother of petitioner No. 1, was killed and on the report of his another brother namely, Biswanath Parida, Kabisuryanagar P.S. Case No. 141 of 1996 corresponding to G. R. Case No. 224 of 1996 was registered in the Court of J.M.F.C., Kodala for the offences punishable Under Sections 302/307/34, I.P.C. read with Section 25-A and 27 of the Arms Act against one Hari Swain and some others. The complainant in the present case (I.C.C. No. 19 of 1998) is the wife of that Hari Swain.

3. As a counter blast to that murder case, a report was lodged by the complainant Dali Swain reporting before the O.I.C., Kabisuryanagar P.S. that at about 8 A.M. on 31.8.1997 when the male members in the house were absent,

the present petitioners entered into her house from the back side after scaling the wall and opening the back door and ransacked her house and removed ornaments, utensils, paddy and rice, and at that time all the accused persons were armed with deadly weapons and they applied their force and also put the complainant into fear of death. That report was registered as Kabisuryanagar P.S. Case No. 91 of 1997 corresponding to G. R. Case No. 163 of 1997.

In course of investigation, the Investigating Officer made a spot visit and found absence of the mark of violence in the residential premises of the complainant. The statement recorded in course of the investigation would reveal that the complainant herself with the assistance of several other persons which includes Gangadhar Swain, Lingaraj Swain (two witnesses examined in the enquiry u/s 202, Cr.P.C. in the complaint case) removed the utensils from her house and carried in a bullock cart to the house of one Udaya Swain in another village. The Investigating Officer on conducting a house-search in the house of said Udaya Swain could recovered such utensils and seized them. The investigation disclosed that the complainant herself had removed the articles and for that reason Final Report was submitted in G.R. Case No. 163 of 1997.

That Final Report was received in the Court of S.D.J.M. on 11.5.1998 and thereafter, without deciding whether it should be accepted or rejected, (learned J.M.F.C. issued notice to the complainant to file protest petition, if any. On 10.7.1998 protest petition was filed and on 12.7.1998 the complaint case was registered. Learned Magistrate after recording the initial statement of the complainant, directed for enquiry u/s 202, Cr.P.C. On 23.9.1998 the last witness, i.e. P.W. 4 was examined. Complainant filed a memo declaring closure of evidence from her side in the enquiry u/s 202, Cr.P.C. Learned J.M.F.C. adjourned the case till 17.10.1998 directing the O.I.C. to submit a report. Such report was received and put up before the Magistrate on 27.10.1998 and thereafter on 3.12.1998 after perusal of the Case Diary and the statements recorded u/s 202, Cr.P.C., learned Magistrate took cognizance of the offence punishable u/s 395, I.P.C. vide the impugned order.

Besides the above conduct of the complainant to influence and terrorise the prosecution witnesses of the murder case pending against Hari Swain (husband of the complainant) the three sons of said Hari Swain with his associates also kidnapped Biswanath Parida (petitioner No. 6) in the night of 4.6.1998. That fact being reported in Kabisuryanagar Police Station P.S. Case No. 19 of 1998 was registered corresponding to G.R. Case No. 78 of 1998 of the Court of J.M.F.C., Kodala. Petitioner No. 6 was recovered from their custody and charge-sheet was filed against the said accused persons, out of whom three are the sons of said Hari Swain and the witnesses examined by the complainant in this case namely Gangadhar Swain also appears as an accused in G.R. Case No. 78 of 1998. After being committed to the Court of Sessions that case is pending as Sessions Case No. 67 of 1999 in the Court of Assistant Sessions Judge, Chhatrapur.

Learned Counsel for the petitioners argued that the aforesaid fact clearly makes

out non-existence of a prima facie case against the petitioners and initiating the criminal proceeding against the petitioners by the complainant is with ulterior motive and false accusation and therefore learned J.M.F.C. when choose to peruse the Case Diary and the statements recorded u/s 202, Cr.P.C. he should have refused to issue process against the petitioners and should have dismissed the complaint u/s 203, Cr.P.C. besides accepting the Final Report. In that context he relied on the ratio in the case of State of Haryana and others Vs. Ch. Bhajan Lal and others, and Sunil Kumar Vs. M/s. Escorts Yamaha Motors Ltd. and Ors,

4. Learned Counsel for the opposite party without disputing about existence of the two sessions cases, however, argued that the F.I.R. in G. R. Case No. 163 of 1997 prima facie made out a case u/s 395, I.P.C. but that case was not only properly investigated by the Investigating Officer but also the accused persons were favoured by filing a Final Report. Under such facts and circumstance when the complainant and her witnesses, who are eye-witnesses to the occurrence, made their statements in the enquiry u/s 202, Cr.P.C. and the learned Magistrate on due consideration of the same has recorded his finding regarding existence of a prima facie case for the aforesaid offence, this Court should not interfere with that order of cognizance and accordingly the application u/s 482, Cr.P.C. should be rejected. In the context of the nature and scope of enquiry u/s 202, Cr.P.C. vis-a-vis the order under Sections 190 and 204, Cr.P.C. and the duty of the superior Courts in analysing the correctness of the order of cognizance, learned counsel for the opposite party relied on the cases of Sardar Trilok Singh and Others Vs. Satya Deo Tripathi, ; Hareram Satpathy Vs. Tikaram Agarwala and Others, ; Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, ; Chandra Deo Singh Vs. Prokash Chandra Bose and Another, and Nirmaljit Singh Hoon Vs. The State of West Bengal and Another,

5. In paragraph 12 in the case of Chandra Deo Singh (supra) the Apex Court held that:

"Thus, where there is a prima facie case, even though much can be said on both sides, a committing Magistrate is bound to commit an accused for trial. All the greater reason, therefore, that where there is prima facie evidence, even though an accused may have a defence like that in the present case that the offence is committed by some other person or persons, the matter has to be left to be decided by the appropriate forum at the appropriate stage and issue of process cannot be refused."

The aforesaid ratio of the Apex Court, which was placed with contentions by learned counsel for opposite party No. 2 that the Case Diary cannot be looked into while considering the question u/s 202, Cr.P.C. is strictly not applicable in this case in as much as in the cited case the fact under consideration was whether the Case Diary in an investigation conducted by police relating to the murder on the basis of F.I.R, lodged by some other person against some other persons can be perused while considering the complaint by a different person alleging murder against some other person as the accused. In the case at hand,

Dali Swain lodged the F.I.R. which was investigated by the Police and thereafter she filed the complaint. Therefore, the facts sequence in this case differ from the above cited decision. Be that as it may, whether or not the police report should be looked into at the relevant stage is a matter which shall be discussed and decided at a subsequent state in this judgment.

In *Nirmaljit Singh Hoon* (supra) the above quoted ratio of Chandra Deo Singh was followed to hold that at the stage of taking cognizance, the cognizance taking Magistrate is not to consider whether there is sufficient ground for conviction, but he is to assess and find out if there is prima facie evidence to connect the accused with the "alleged crime."

In the case of *Smt. Nagawwa* (supra) the Apex Court held that:

"... It is true that in coming to a decision as to whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and established of a prima facie case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused ..."

In the case of *Hareram Satpathy* (supra) the Apex Court followed the above quoted ratio from the cases of *Nagawwa* (supra) and *Chandra Deo Singh* (supra).

In the case of *Trilok Singh* (supra), the respondent lodged F.I.R. alleging committing of the offences punishable under Sections 395/468/465/471/412/120-B/34, I.P.C. by the appellants and others. The investigating agency submitted a final report and that was accepted by the cognizance taking Magistrate. The respondent unsuccessfully challenged that order in the Court of Sessions Judge and the High Court and thereafter filed a complaint. After an inquiry u/s 202, Cr.P.C., learned Magistrate took cognizance of the offence u/s 395, I.P.C. Appellant's application u/s 482, Cr.P.C. was rejected by the High Court and, therefore, they preferred appeal to the Supreme Court. On analysis of the fact and the allegation, the Apex Court held that the dispute was Civil in nature relating to the hire purchase agreement. Therefore, to prevent the abuse of process of Court the order of cognizance was quashed.

In the case of *State of Haryana* (supra) while considering the question of quashing of the F.I.R. and the investigation against Ch. Bhajan Lal and others, the Apex Court have propounded that in certain categories of cases the High Court may exercise the power under Article 226 of the Constitution or u/s 482, Cr.P.C. relating to cognizance of the offence to prevent abuse of the process of the Court or to secure the ends of justice. The Apex Court has cautioned that

such power be exercised sparingly and that to in the rarest of the rare cases. In that context, learned counsel for the petitioners relied on the last category of cases enumerated by the Apex Court, which reads as hereunder:

"7. Where a criminal proceeding is manifestly attended with mala fide maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

Being abreast of the proposition of law in the aforesaid manner, this Court has to assess the contention of the parties to resolve the dispute.

6. Petitioner's contention that the entire allegation is fabricated by the complainant Dali Swain because of the murder case instituted against her husband and that undisputed fact coupled with the final report submitted by the Investigating Officer after recovery of the alleged articles from the house of one Udaya Singh makes it crystal clear that the complaint is manifest with concocted story with a view to harass the petitioners. He further argued that though at the stage of taking of cognizance the trial Court was required to confine to the materials available to him but while considering this application u/s 482, Cr.P.C. This Court can visualise the situation by referring to the public records, such as, the aforesaid sessions cases against her husband, sons and associates relating to the offences of murder and kidnapping of witnesses. In that respect he relied on the ratio in the case of Sunil Kumar (supra) where the Apex Court has held that from the F.I.R. if the necessary ingredients of the alleged offences is not made out and on the other hand the attendant circumstances indicate that the F.I.R. was lodged to pre-empt the filing of the criminal complaint against the informant, then in such a case the High Court can interfere to pass appropriate order in exercise of the inherent power u/s 482, Cr.P.C.

7. The counter argument of Mr. D. P. Dhaf, learned counsel for the complainant/opposite party is that at the stage when the Court examines whether or not there exists a prima facie case, the defence plea of the accused is of no relevance. At that stage the Magistrate is to take into consideration the statement and evidence available to him as per the enquiry u/s 202, Cr.P.C. and if that satisfies the ingredients of law constituting the offence, then it is not permissible for the cognizance taking Magistrate or the superior Courts having the supervisory jurisdiction to interfere with the discretion exercised judiciously by the cognizance taking Magistrate. He further argued that at that stage the cognizance taking Magistrate is not to look to other materials except the evidence which is available to him in the enquiry and, therefore, perusal of the Case Diary and comparison of the statement of the complainant and witnesses is not permissible. He argued that the statements of the four witnesses examined in course of the enquiry u/s 202, Cr.P.C. makes out a prima facie case u/s 395, I.P.C. and therefore, the Magistrate was well within his jurisdiction to take cognizance of the offence besides passing order for issue of process and therefore, that order is not liable to be interfered with.

8. From the above argument one of the core question which emerges for consideration is whether the cognizance taking Magistrate is required to peruse and consider the Case Diary and the final report while considering the question of taking of cognizance and issue of process on the basis of the protest petition / complaint. The provision of law in the Code of Criminal Procedure, 1973, so far as it relates to Sections 190, 200, 202 and 204, Cr.P.C., there is no specific provision providing for perusal of the case diary and the final report while considering the question of issue of process on the basis of a protest petition/complaint. Thus, this Court is of the view that the provision of law does not mandate perusal of the case diary and the final report mandatory while considering the question of taking cognizance of offence and issue of process on the basis of a protest petition/complaint. Since the enquiry undertaken u/s 202, Cr.P.C. is with a view to find out whether or not there is sufficient ground for proceeding, therefore, in his wisdom if the Magistrate thinks it prudent or relevant to refer to the case diary, that cannot be regarded as impermissible nor the order passed thereafter as illegal. In this case learned Magistrate has not referred to the case diary while considering the outcome of the enquiry conducted by him. So, that order is not liable to be interfered with on that ground.

9. It is the settled position of law, as rightly argued by Mr. Dhal, learned counsel for the complainant/opposite party, that at the stage of taking cognizance and issue of process the cognizance taking Magistrate is to consider whether there exists sufficient material to proceed against the accused. At that stage, the Magistrate is not to consider and not to weigh the evidence as to whether that is sufficient to convict the accused and fairly that position of law is not disputed by Mr. Nayak, learned counsel for the petitioners. On the other hand his contention is that in a case of this nature, this Court cannot restrict its zone of consideration within the parameter of Sections 190 and 204, Cr.P.C. when on record it is seen that continuation of the criminal proceeding amounts to abuse of process of Court and, therefore, not confining to the said two provisions this Court should invoke the inherent power and quash the proceeding.

10. It is needless to point out that Section 482, Cr.P.C. enjoins jurisdiction on the High Court to invoke the inherent power where the Court finds, inter alia, a circumstance of abuse of process of Court. A watchful consideration of the contention of the complainant/ opposite party virtually is to the effect that process of the Court should not be interfered with-because of the statement of the complainant and her witness satisfying the ingredience of Section 395, I.P.C. The aforesaid approach of the complainant undoubtedly is found not acceptable because of the facts already narrated in detail disclosing that complaint was instituted with the ulterior motive for wreaking vengeance on the ground of sessions cases being pending against her husband, sons and their associates/supporters. Therefore, even if there exists a prima facie case because of the parrot-like statement of the complainant and her witnesses, but genuineness in the complaint lacks bonafide because the complainant has stated nothing about

the whereabouts, of the alleged stolen property and did not whisper anything regarding recovery of such articles from the possession of one of her witnesses. That circumstance speaks volumes against her conduct and spit on the merit of the complainant's contention. That aspect cannot be ignored by this Court when undoubtedly that reveals regarding making abuse of the process of the Court as provided under law and the complaint being instituted dishonestly, maliciously and untruly. The authorities discussed above cited from either side do not enunciate to not to invoke the inherent power in such a case to quash the criminal proceeding.

For the reasons indicated above, this Court finds genuineness in the prayer of the petitioners and allowed the same by quashing the proceeding of I.C.C. No. 19 of 1998 of the Court of J.M.F.C., Kodala. The Criminal Miscellaneous Case is accordingly allowed.

11. Since the connected case records from the Courts of Sessions had been called for in this Case for reference, so the Registry is directed to see to it that such records are returned to the trial courts most expeditiously and preferably within a period of four weeks.