

(1986) 09 PAT CK 0006

In the Patna High Court

Case No : Criminal Revision No. 962 of 1982

Sk. Sikandar and 12 others

APPELLANT

Vs

The State of Bihar and another

RESPONDENT

Date of Decision : 23-09-1986

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 173(1), 190(1)(a), 190(1)(b), 200

Penal Code, 1860 (IPC) — Section 147, 148, 323, 436

Citation : (1986) PLJR 265

Hon'ble Judges : S.H.S. Abidi, J

Bench : Single Bench

Advocate : Sarwan Kumar, for the Appellant; Amarendra Prasad . A. P. P. and Ram Ran Vikat Singh (for informant), for the Respondent

Final Decision : Dismissed

Judgement

S.H. S. Abidi, J.—Petitioners Sk. Sikandar & 12 others have come to this Court in revision against an order of the learned Sessions Judge, Bettiah, who has allowed the revision of opposite party no. 2 Munsif Mian who had felt aggrieved upon the dismissal of his complaint u/s 203 of the Code of Criminal Procedure (for short the "Code") by the learned Sub divisional Judicial Magistrate, Bagaha. Opposite party no. 2 filed a complaint on 8.12.1979 against the petitioners for offences alleged to have been committed on 16.12.1979 under sections 147, 148, 436 and 323 of the Indian Penal Code (for short "I. P. C") in the court of the learned S. D. J. M. Bagaha, who in turn, ordered Lauria police station for instituting a case u/s 156 (3) of the Code and to submit report. The first information report was instituted on the basis of a complaint and the police started investigation. While the investigation was continuing opposite party no. 2 filed a protest petition on 8.7.1980. The police submitted final form on 12.2.1981 saying that the accusations against the said accused were false. The final form in favour of the accused was accepted by the learned Magistrate on 27.4.1981 stating therein that the accusations under the aforesaid sections were false. After

perusal of the final form as well as the complaint, the final form was accepted. The complainant was present on that date. The complainant had already filed the protest petition and 25.5.1981 was next date fixed and the protest petition was sent to the clerk concerned for institution.

2. On 26.5.1981 the complainant was examined and thereafter four witnesses were examined on 8.7.1981, 8.8.1981, 19.11.1981 and 7.12.1981. The learned Magistrate thereafter dismissed the complaint on 28.1.1982 u/s 203 of the Code holding that as the final form was accepted in favour of the accused earlier and so subsequently no complaint petition could be entertained.

3. The complainant-opposite party no. 2 went to the Court of Sessions Judge in revision (Revision No. 40 of 1982), who allowed the same after hearing the parties holding that though the informant was present in the court and even then his protest petition was not put up nor his lawyer was heard and in mechanical way the final form was accepted and even thereafter the witnesses were examined and the complaint petition was dismissed on technical ground of non-maintainability after the acceptance of the final form, and so the learned Magistrate had committed error of law by not considering the protest petition, and he should have decided the matter together after consideration of the final form and the protest petition. He, therefore, allowed the revision and set aside the order of the learned Magistrate dated 28.1.1982 u/s 203 of the Code as well as the order dated 27.4.1981 accepting the final form. The learned Sessions Judge further directed the learned Magistrate to consider the protest petition as well as pass orders on the final form.

4. The accused-petitioners have come to this Court in revision against the said order of the learned Sessions Judge saying that once the final form has been accepted, the court has no jurisdiction to proceed with the case. In support of this contention he has relied upon a decision reported in 1981 B. L. J. R. 337 - Umashanker Singh & ors. v. State of Bihar. Further it was said that the matter in the final form and the complaint was the same and so after the acceptance of the final form there was no fresh material before the court to proceed with the case.

5. Learned Counsel for the opposite party no. 2 argued that even after acceptance of the final form the court could have proceeded with the case which was based on a complaint and the acceptance of a final form was not a bar to the court to decide the case of the complainant, in accordance with law and that the decision of Umashanker (supra) is not good law and in view of the decisions reported in AIR 1982 S.C. : 1983 PLJR 34 (SC) Gopal Vijoy Verma v. Bhuneshwar Prasad Sinha and a Division Bench decision reported in 1985 Cr. L.J. 437 : 1984 PLJR 774, Munilal Thakur v. Nawal Kishore Thakur. It was further argued that once a first information report or complaint discloses an offence triable by the Court of Session, then the Magistrate under the provision of section 209 of the Code has no option but to commit the same to the Court of Session, if prima facie case after enquiry is made out that an offence triable by Court of Session has been committed and so the learned Magistrate court not pass an order u/s 203 of

the Code, rather he should have taken recourse of provisions of section 209 for committing the case to the Court of Session.

6. In this case, no doubt, the occurrence is said to have taken place on 6.12.1979 and the complaint was filed on 8.12.1979 and on the basis of this complaint, the learned Magistrate has ordered u/s 156 (3) of the Code for institution of the first information report and the first information report was registered and investigation was done and in the mean while on 8.7.1980 the protest petition was filed. So at the time of passing of the order regarding acceptance of the final form on 27.4.1981, the protest petition was pending. The complainant was present in the court. It was, but natural and necessary for the court to have heard the Learned Counsel for the complainant in support of the same. The learned Magistrate accepted the final form and proceeded with the complaint petition fixing 25.5.1981. No doubt, there are two cases of this Court namely, UmaShanker Singh (supra) wherein it has been held that the Magistrate has no jurisdiction to initiate fresh proceeding against the same petitioner after accepting the final form and so the proceeding was liable to be quashed. In the other decision, namely, Bhuneshwar Pd. Sinha v. State of Bihar reported in 1981. B.L.J. 336 : 1981 B.L.J.R. 369; 1981 Cr. L. J. 795 wherein it has been held that whenever a final form is submitted the informant is entitled to file a protest petition or a complaint petition before or after filing of the final form etc. should keep both the matters i. e. the acceptance of the final form and the protest petition for hearing on the same date. If the Magistrate takes cognizance on the basis of the. complaint petition then in that case he should not accept the final form. If once he accepts the final form then on the same facts constituting the offence, is not entitled to take cognizance on the basis of the complaint petition or protest petition because that will result in two inconsistent orders passed by the judicial officer. The learned Judge relied on the decision in Abhinandan Jha and Others Vs. Dinesh Mishra, . Thereafter the learned Judge observed that in the present case it is clear that the order dated 6.12.1978 that the final form was accepted by the court earlier and if it is so then the Magistrate was not justified in taking cognizance in respect of the same facts constituting the offence which was mentioned in the final form and that in order to check the litigation it was necessary that when a judicial order is passed by accepting the final form, such order should not be set aside by the Magistrate by taking cognizance on the basis of the complaint petition.

7. Against the said decision Gopal Vijoy Verma, who was the complainant in that case went up to the Supreme Court where their Lordships considering the decision in H.S. Bains, Director, Small Saving-Cum-Deputy Secretary Finance, Punjab, Chandigarh Vs. State (Union Territory of Chandigarh), reversed the order of the High Court in Bhuneshwar Pd. Sinha v. State (supra) and disposed of the matter summarily and held that "the High Court was clearly in error in thinking that the Magistrate cannot take cognizance of a case upon complaint because he had earlier refused to take cognizance of the case on a police report. The order of the High Court is set a side. The matter is remitted to the Chief Judicial

Magistrate, Patna for disposal according to law. If the accused have any further objection to raise, they may do so before the Chief Judicial Magistrate." In the case of Tula Ram and Others Vs. Kishore Singh, it was held that "where a final form was submitted by the police that no case was made out against the accused, yet the court held that the Magistrate had power to examine the witnesses on the complaint and thereafter issue process against the accused u/s 204 of the Code". Similarly it was held in the case of H. S. Bains (supra) as follows:

Thus, a Magistrate, who on receipt of a complaint, orders investigation u/s 156 (3) and receives a police report u/s 173 (1), may, thereafter, do one of the three things, (1) He may decide that there is no sufficient ground for proceeding further and drop action, (2) He may take cognizance of the offence u/s 190 (1) (b) on the basis of the police report and issue process : This he may do without being bound in any manner by the conclusion arrived at by the police in the report; (3) He may take cognizance of the offence u/s 190 (1) (a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses u/s 200 If he adopts a third alternative, he may hold or direct an enquiry u/s 202 if he thinks fit. Thereafter, he may dismiss the complaint or issue process, as the case may be.

8. A Division Bench of this Court in Munilal Thakur & ors. v. Nawal Kishore Thakur (1985 Cr. L. J. 437 : 1984 PLJR 774) considered the aforesaid cases and held that a Magistrate even after accepting final report can still take cognizance of the offence upon a complaint or a protest petition on same or similar allegations of fact.

9. Thus from all this it is clear that when the first information has been lodged and final form has been accepted and thereafter complaint petition has been filed or in another case where complaint has been filed before a Magistrate who in turn orders for investigation by the police u/s 156 (3) of the Code where after the police sends its report against which if the aggrieved complainant files a protest petition or a complaint is filed and if in both the said eventualities the Magistrate accepts the final form in favour of the accused, even then the Magistrate has got jurisdiction to act upon the complaint or the protest petition treating the same as a complaint, on the same facts as said in the report which was a subject matter of the final form and he can pass orders u/s 203 or 204, as the case may be and that the acceptance of the final form does not bar the jurisdiction of the Magistrate to proceed on the same facts alleged in the said complaint or the protest petition. In the present case, even if the Magistrate, as said above, accepted the final form on 27.4.1981, had rightly proceeded with the protest petition and complaint, but later on he has erred in law in dismissing the complaint u/s 203 holding that the, complaint was barred as final form has been accepted. Thus the order of the learned Magistrate dated 28.1.1982 was illegal and bad in law.

10. The other point that arises in this case is that a complaint filed on 8.12.1979

regarding the offence alleged to have been committed under sections 147,148,436 and 323 of I. P. C. and so were the allegations and the offences alleged in the protest petition. Thus, obviously a case u/s 436 I. P. C. has been alleged which is a case triable by Court of Sessions.

11. u/s 209 of the Code a Magistrate is to commit to the Court of Sessions the case triable by a Court of Sessions only after finding out that the case was triable by Court of Sessions, In this way in the particular case the Judicial Magistrate has performed his judicial function and witnesses had been examined where after the Magistrate should have committed this case to the Court of Sessions instead of passing an order u/s 203 of the Code. He should have taken recourse of the provisions of section 204 and should have committed the case to the Court of Sessions and not pass the order u/s 203 of the Code.

12. In the case of Sanjay Gandhi Vs. Union of India (UOI) and Others, it was observed that a Magistrate has got no power to discharge an accused if it finds that a case was triable exclusively by a Court of Sessions and he was only to proceed to satisfy that the case was triable by a Court of Sessions. Similarly, in the case of Shri Kewal Kishun. v. SurajBhan & another (AIR 1980 S. C 1980) their Lordships of the Supreme Court have held that the case started on police report or otherwise including those on the basis of complaint has to be committed to the Court of Sessions after application of judicial mind the Magistrate only for purpose of finding out that the case was triable by Court of Sessions, the court finds that the case was triable by the Court of Sessions and if it finds that if it was so then he has no option but to commit the case to the Court of Session.

13. Thus, in this view of the matter, passing of the order u/s 203 of the Code by the learned Magistrate holding that after the acceptance of the final form he could not proceed with the complaint was bad on this score also, besides on the point already referred above. In the result, this revision petition of the petitioners has got no merit and fails The learned Magistrate as directed by the burned Sessions Judge will look into the matter and proceed in accordance with the observations made above.