

(2013) 10 PAT CK 0024

In the Patna High Court

Case No : Criminal Revision No. 1669 of 2009

Subodh Sharma

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 30-10-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 192, 200, 202, 202(2), 203

Citation : (2013) 10 PAT CK 0024

Hon'ble Judges : Aditya Kumar Trivedi, J

Bench : Single Bench

Advocate : Kumar Vikash Sharma, for the Appellant; Arif, Assistant Public Prosecutor for the State and Mr. Umesh Kumar Singh, for the Respondent

Final Decision : Allowed

Judgement

Aditya Kumar Trivedi, J.—Petitioner/complainant is aggrieved by the order dated 03.07.2009 passed by Additional Sessions Judge, Vth, East Champaran at Motihari in Cr. Revision No. 53 of 1997/14 of 2008 whereby and whereunder the learned revisional court set aside the order dated 16.01.1997 passed by Sri O.P. Sinha, Judicial Magistrate, 1st Class, Motihari in Complaint Case No. 1267 of 1996 in terms of Section 204 of the Cr.P.C. and remanded the matter with a direction to proceed in accordance with law. It has been submitted on behalf of petitioner that the finding recorded by the learned revisional court as is evident from para-6 and 7 of the order impugned is abrupt and based upon erroneous consideration because of the fact that by a catena of decisions, it has been settled at rest that proviso having u/s 202 of the Cr.P.C. requiring to examine all the witnesses while the offence so alleged appears to be triable by the court of Session, happens to be directory one. It has further been submitted that during course of an inquiry having u/s 202 of the Cr.P.C. only gist of the evidences is to be recorded and so, whenever there happens to be large number of accused, instead of name of all the accused, name of one of the accused and others are mentioned. Because of the fact that the witnesses happens to be before the

Magistrate, therefore, the statement of the witness is perceived by the court during course of passing an order after concluding the inquiry. As such, the order of the learned revisional court appears to be suffering from unfounded conclusion as well as surmises. Also referred Shivjee Singh Vs. Nagendra Tiwary and Others, Naresh Singh and 2 Others Vs. The State of Bihar,

2. The learned Additional Public Prosecutor endorsed the view and submitted that enquiry to be conducted under banner of Section 202 Cr.P.C. basically relates with searching out prima facie case and nothing more and for that, examination of all the witnesses so named in complaint petition even the offence, being triable by the court of Sessions is not necessary. It is to be considered in a backdrop whether material placed before the court justify opinion regarding presence of prima facie case.

3. At the other hand the learned counsel for the Opposite Party Nos. 2 to 19 have submitted that purpose for holding an inquiry u/s 202 of the Cr.P.C. is to ascertain the truth which could justify the further step of learned Magistrate enabling him to issue process u/s 204 of the Cr.P.C. or to dismiss the same in accordance with Section 203 of the Cr.P.C. in case no prima facie case is found thereupon. It has also been submitted that for the same cause police case is also pending and in the aforesaid background the learned revisional court was fully justified in getting the matter remitted back to the learned lower court to proceed afresh in accordance with law after setting aside the order of issuance of process. The learned counsel also submitted that complainant had failed to produce prima facie evidence with regard to ownership of Plot No. 111 having under dispute and so the learned lower should not have issued process against the Opposite Party No. s. 2 to 19. It has further been submitted that the witnesses, who were examined during course of inquiry have not named all the O.Ps. from 2 to 19 and on account thereof, summoning of those, who have not been named by the witnesses, have rightly been identified by the learned revisional court.

4. It has further been submitted that Criminal Procedure Code governs and prescribe the procedure for conduction of cases relating to criminal offences. Section 200 Cr.P.C. deals with filing of complaint while Section 202 Cr.P.C. prescribes a procedure to be followed by the court whenever the court halt before issuance of process, to see prima facie evidence in support of allegation. The visibility of proviso u/s 202 Cr.P.C. happens to be in obligatory form which has to be duly complied with whenever the complaint discloses offence exclusively triable by the Court of Session. It has further been submitted that taking cognizable by the transferee court is bad in law because the transferee court is not competent to conduct an inquiry. The learned counsel also referred Md. Rafi and Others Vs. The State of Bihar and Another,

5. The purpose and scope of Section 202 of the Cr.P.C. has elaborately been explained in Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, wherein, it has been observed:

It would thus be clear from the two decisions of this Court that the scope of the inquiry u/s 202 of the Code of Criminal Procedure is extremely limited- limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint- (i) on the materials placed by the complainant before the court: (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have.

6. The ticklish question relating to adaptation of proviso of Section 202 Cr.P.C. has been taken into consideration by the Hon'ble Apex Court at so many occasions. In Shivjee Singh Vs. Nagendra Tiwary and Others, the scope of proviso of 202 has been taken into consideration and has been dealt with elaborately observing its mandate as directory and not mandatory. After discussing all the earlier judgments, it has been concluded under para-16 as follows:

16. As a sequel to the above discussions, we hold that examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the direction given by the Magistrate in terms of the proviso to Section 202(2) is not a condition precedent for taking cognizance and issue of process against the persons named as accused in the complaint and the High Court committed serious error in directing the Chief Judicial Magistrate to conduct further inquiry and pass fresh order in the light of the proviso to Section 202(2).

7. Therefore, finding of revisional court at this score is not at all found to be in accordance with law and is subject to disaffirmation.

8. Though the order impugned did not deal with the point, but as the O.P. No. 2 to have raised the issue that transferee court could not conduct enquiry u/s 202 Cr.P.C. and for that relied upon a decision reported in 1987 BLJ 874 wherein it has been observed that inquiry entrusted to a Judicial Magistrate in terms of Section 202 of the Cr.P.C. appears to be bad. Hence, it looks desirable to deal with the same.

9. For better appreciation of the issue Section 202 of the Cr.P.C. is quoted below:

202. Postponement of issue of process

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized 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:

Provided that no such direction for investigation shall be made--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath u/s 200

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

10. Section 202 of the Cr.P.C. is a stage prescribed under Cr.P.C. to enable the Magistrate to trace out, prima facie, material in support of allegation. Section 202 of the Cr.P.C. is interlinked with Section 200 of the Cr.P.C. which deals with the procedure whenever a complaint is placed before the Magistrate. For better appreciation the same is quoted below:

200. Examination of complainant--

A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate u/s 192:

Provided further that if the Magistrate makes over the case to another Magistrate u/s 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

11. At the present juncture it looks necessary to incorporate Section 192 of the Cr.P.C. and the same is incorporated below:

192. Making over of cases to Magistrates--

(1) Any Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to any competent Magistrate subordinate

to him

(2) Any Magistrate of the first class empowered in this behalf by the Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to such other competent Magistrate as the Chief Judicial Magistrate may, by general or special order, specify, and thereupon such Magistrate may hold the inquiry or trial.

12. Taking of cognizance is not defined under Cr.P.C. however by a catena of decisions, it has been settled at rest as having application of judicial mind. Whenever a complaint is placed before the Chief Judicial Magistrate, he may examine the complainant on S.A. he may summon the accused or he may proceed to inquire into the matter himself or entrust an investigation to police officer or any other authority or he may transfer the case in accordance with Section 192 of the Cr.P.C. even without recording S.A. which the transferee court will do. Again transferee court has got same option as indicated above. That means to say whenever the Chief Judicial Magistrate opted for transfer of complaint, the same has to be in accordance with Section 192 Cr.P.C. whereupon the transferee court will come in seisin of the matter. That means to say, without having application of Section 192 Cr.P.C. that means to say without having complaint transferred to the court of magistrate, enquiry cannot be entrusted and what the law as cited on behalf of O.P. No. 2 to 19 speaks. Hence it has got no application in fact and circumstances of instant case.

13. In *Md. Enamuddin and Others Vs. State of Bihar and Others*, so relied upon by the learned counsel for the Opposite Party, the process was set aside in the background of the fact that in the complaint petition the complainant had not asserted right to hold and possess the land under dispute. In para-15 the gist has been dealt with in following manner:

15. Coming back to the facts of the instant case, as noticed above in the complaint petition, there is no averment about the right of the complainant to hold and possess the plots in question, nor any evidence was led to show prima facie, that the complainant is in possession. On the other hand, what I found is that the petitioners have acquired the aforesaid plots by virtue of registered sale deeds executed sometime in the year 1983-84. I further found that the names of the petitioners were duly recorded in the survey Khatian and rent receipts have been issued regarding payment of rent by the State of Bihar. On the basis of these evidences and in absence of any material evidence that should have been produced by the complainant, I have no doubt in my mind to hold that the impugned order was passed by the Magistrate mechanically and without applying his judicial mind. If the impugned order is held to be justified then it will open a Pandora Box for every person to set the Criminal Court on motion by merely lodging a complaint alleging that the complainant has grown the paddy in the land and the same has been removed by another person.

14. Here no such claim has been raised on behalf of Opposite Party Nos. 2 to 19

nor such kind of disclosure is visualizing from the order of the revisional court. Contrary to it, right from complainant petition, petitioner has claimed title and possession over the land.

15. Now coming to the procedure with regard to recording of evidence during course of conduction of inquiry. For that purpose Criminal Court Rules is to be taken note of which deals with the specific mode under Chapter-IV at Rule-31 however is found absent under Cr.P.C.

31. The examination of the complainant and the witnesses present, if any, is not to be a mere form, but an intelligent enquiry into the subject-matter of the complaint carried far enough to enable the Magistrate to exercise his judgment as to whether there is or is not sufficient ground for proceedings.

Note.--Statement of complaint and the witnesses present, if any, should ordinarily be recorded on the back of the petition.

16. When there happens to be procedure prescribe for recording statement of the witnesses in particular mode, manner that has to be followed. The S.A. as well as the statement of the witnesses ordinarily be recorded on the back of the compliant petition is itself suggestive of the fact that it should be in a gist and not elaborately. From Annexure-1, it is apparent that altogether nineteen accused have been named along with large number of persons who have raided over land of petitioner/complainant and looted away the crop, hence in the aforesaid events really it was possible for the magistrate to incorporate names of all the accused. As it has not been done so, whether the petitioner/complainant be punished for the same. It is settled principle of law that a litigant should not suffer for the fault of the court. Although the learned counsel for the Opposite Parties have disclosed that a police case is also going on but neither the P.S. Case No. has been disclosed nor by way of counter affidavit any document in support thereof has been brought up on record. From the complaint petition Annexure-1, it is apparent that police was informed, presence of police has been admitted but it has categorically been stated that no case was registered by the police and on account thereof aforesaid disclosure remained un-controverted.

In the aforesaid facts and circumstances of the case, the order passed by learned revisional court appears to be unsustainable in the eye of law and is accordingly set aside. Petition is allowed.