
(2011) 03 OHC CK 0054

Orissa High Court

Case No: Criminal MC. No. 1389 of 2010

Bahlab Charan Sahoo

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision: March 4, 2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€” Section 156(3), 173, 173(2), 190,
190(1)#Prevention of Corruption Act, 1988 â€” Section 5, 7

Citation: (2011) 03 OHC CK 0054

Hon'ble Judges: L. Mohapatra, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

L. Mohapatra, J.

This application u/s 482 of the Cr. P.C. has been filed against the order dated 30.4.2010 passed by the learned Special

Judge (Vigilance), Bhubaneswar in V.G.R. No.7 of 2009 dismissing the protest petition.

2. The case of the prosecution is that the petitioner, who is the informant and is working as a Junior Assistant in Puri Konark Development

Authority had applied for sanction of E.L. for 140 days and the said file was pending with Shri Prasant Kumar Pattnaik, who was the Planning

Member and Secretary of P.K.D.A. The leave application of the petitioner having not been sanctioned, he approached Shri P.K. Pattnaik for

sanction of leave and it is alleged that there was a demand for payment of Rs. 30,000/- from out of the leave salary. The petitioner promised to

pay the amount after receipt of the leave salary and accordingly the same was sanctioned on 24.11.2008. However, at the time of approving the

draft sanction letter, Shri Pattnaik demanded Rs.5,000/- to issue the letter and when the petitioner expressed his unwillingness to pay, Shri Pattnaik

did not issue the letter. Finding no way, the petitioner again approached Shri Pattnaik and the demand was reduced from Rs.5,000/- to Rs.3,000/-

. Therefore, the petitioner under compulsion paid a sum of Rs.3,000/- to Shri Pattnaik as bribe on 17.3.2009 and reported the matter to the S.P.,

Vigilance, Bhubaneswar. On the strength of the said information, Bhubaneswar Vigilance P.S. Case No.7 dated 16.3.2009 was registered for

commission of offence u/s 7 of the Prevention of Corruption Act, 1988 and a trap was laid. After investigation, the Vigilance Department did not

find sufficient evidence to submit a charge-sheet and accordingly Final Form was submitted on 14.12.2009 after obtaining necessary orders from

the S.P., Vigilance. After receipt of the Final Form, the Court issued notice to the petitioner (informant) to file protest petition. After receipt of

notice, the petitioner filed a protest petition and the said protest petition having been rejected in the impugned order, this application u/s 482

Cr.P.C. has been filed.

3. Shri Mishra, the learned counsel appearing for the petitioner assailed the order (sic) on two grounds:

(1) The protest petition is required to be treated as a complaint petition and the enquiry u/s 202 of the Cr.P.C. should have been conducted.

Without following the procedure prescribed, the learned Special Judge (Vigilance), Bhubaneswar rejected the protest petition.

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(2) While rejecting the protest petition, the learned Special Judge (Vigilance) analyzed the evidence as if he was writing a judgment after a full-

fledged trial and the same is not permissible under law.

The learned counsel appearing for the Vigilance Department as well as Shri P.K. Pattnaik referring to some decisions of the Hon"ble Supreme

Court submitted that the learned Special Judge (Vigilance) has adopted the correct procedure and enquiry u/s 202 of the Cr.P.C. was not

necessary in the present case, the learned Special Judge having found no material available on record for taking cognizance. So far as the second

ground is concerned, it was contended on behalf of the Vigilance Department as well as Shri P.K. Pattnaik that while rejecting the protest petition,

the Special Judge (Vigilance) is required to give reasons and merely because the reasons have become lengthy, it cannot be said that the learned

Special Judge was writing a judgment after a full-fledged trial.

4. An offence committed under the Prevention of Corruption Act is triable by the Special Judge as Section 5 of the Prevention of Corruption

Act, 1988 prescribes that the Special Judge shall follow the procedure for trial of warrant cases and therefore, so far as the trial of cases is

concerned, the learned Special Judge stands in the footing of a Magistrate. Section 190 of the Code of Criminal Procedure prescribes that a

Magistrate upon receipt of a complaint of facts which constitute such offence or upon a police report of such facts may take cognizance of any

offence. Once cognizance is taken, the Magistrate may proceed to examine the complainant upon oath 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.

The Magistrate may postpone the issue of process and conduct an enquiry u/s 202 of the Cr.P.C. to find out against which accused process is

required to be issued. If the Magistrate does not find any material against any of the accused for issuance of process, he may also dismiss the

complaint u/s 203 of the Code of Criminal Procedure. From the aforesaid provisions, it is clear that the stages of Section 200 and 202 of the

Cr.P.C. shall come only after taking cognizance and the procedure adopted u/s 200 and 202 of the Cr.P.C. is only to find out against which

accused process is required to be issued. In this connection, reference may be made to a decision of the Hon^{ble} Supreme Court in the case of

India Carat Pvt. Ltd. Vs. State of Karnataka and Another, . Paras 13 and 14 of the judgment are quoted below:

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13. From the provisions referred to above, it may be seen that on receipt of a complaint a Magistrate has several courses open to him. The

Magistrate may take cognizance of the offence at once and proceed to record statements of the complainant and the witnesses present u/s 200.

After recording those statements, if in the opinion of the Magistrate there is no sufficient ground for proceeding, he may dismiss the complaint u/s

203. On the other hand if in his opinion there is sufficient ground for proceeding he may issue process u/s 204. If, however, the Magistrate thinks

fit, he may postpone the issue of process and either inquire into the case himself or direct an investigation to be made by the police officer or such

other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in

his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. Yet another course

open to the Magistrate is that instead of taking cognizance of the offence and following the procedure laid down u/s 200 or Section 202, he may

order an investigation to be made by the police u/s 156(3). When such an order is made, the police will have to investigate the matter and submit a

report u/s 173(2). On receiving the police report the Magistrate may take cognizance of the offence u/s 190(1)(b) and issue process straightway to

the accused. The Magistrate may exercise his powers in this behalf irrespective of the view expressed by the police in their report whether an

offence has been made out or not. This is because the police report u/s 173(2) will contain the facts discovered or unearthed by the police as well

as the conclusion drawn by the police there from. If the Magistrate is satisfied that upon the facts discovered or unearthed by the police there is

sufficient material for him to take cognizance of the offence and issue process, the Magistrate may do so without reference to the conclusion drawn

by the Investigating Officer because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or

not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceeding proceed to act u/s 200 by

taking cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statement upon oath of the

complainant and the witnesses present and thereafter decide whether the complaint should be dismissed or process should be issued.

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14. Since in the present case the Second Additional Chief Metropolitan Magistrate has taken cognizance of offences alleged to have been

committed by the second respondent and ordered issue of process without first examining the appellant and his witnesses, the question for

consideration would be whether the Magistrate is entitled under the Code to have acted in that manner. The question need not detain us for long

because the power of a Magistrate to take cognizance of an offence u/s 190(1)(b) of the Code even when the police report was to the effect that

the investigation has not made out any offence against an accused has already been examined and set out by this Court in Abhinandan Jha and

Others Vs. Dinesh Mishra,) and H.S. Bains, Director, Small Saving-Cum-Deputy
Secretary Finance, Punjab, Chandigarh Vs. State (Union

Territory of Chandigarh), . In Abhinandan Jha v. Dinesh Mishra (supra) the question arose whether a Magistrate to whom a report u/s 173(2) had

been submitted to the effect that no case had been made out against the accused, could direct the police to file a charge-sheet, on his disagreeing

with the report submitted by the police. This Court held that the Magistrate had no jurisdiction to direct the police to submit a charge-sheet but it

was open to the Magistrate to agree or disagree with the police report. If he agreed with the report that there was no case made out for issuing

process to the accused, he might accept the report and close the proceedings. If he came to the conclusion that further investigation was necessary

he might make an order to that effect u/s 156(3) and if ultimately the Magistrate was of the opinion that the facts set out in the police report

constituted an offence he could take cognizance of the offence, notwithstanding the contrary opinion of the police expressed in the report. While

expressing the opinion that the Magistrate could take cognizance of the offence notwithstanding the contrary opinion of the police, the Court

observed that the Magistrate could take cognizance u/s "190(1)(c)" The reference to Section 190(1)(c) was a mistake for Section 190(1)(b) and

this has been pointed out in H.S. Bains (supra).

In the case of H.S. Bains, Director, Small Saving-Cum-Deputy Secretary Finance, Punjab, Chandigarh Vs. State (Union Territory of Chandigarh),

and in the case of Sanjay Bansal & another v. Jawajarla Vats & others, reported in AIR 2008 Supreme Court 207, it was decided that when

police after investigation submits a report u/s 173 Cr.P.C. stating that there is no evidence to submit a charge-sheet, the complainant/ informant is

noticed to file a protest petition. If a protest petition is filed, the Magistrate has three options (a) he may decide that there is no sufficient ground for

proceeding further and drop the proceeding; (b) he may take cognizance of the offence

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under Section 190(1)(b) of the Code of Criminal Procedure on the basis of the police report and issue process; (c) he may take cognizance of the

offence treating the protest petition as complaint and thereafter proceed u/s 200 and 202 of the Cr.P.C., if necessary. In the present case, the

learned Magistrate after receipt of the protest petition adopted the first procedure and having found no evidence against the accused Shri P.K.

Pattnaik, dropped the proceeding. Therefore, it was not necessary on the part of the learned Magistrate to adopt the procedure prescribed u/s

200 or 202 of the Cr.P.C., having not taken cognizance of the alleged offence. In view of the above settled position of law, I do not find any

substance in the first ground taken by the learned counsel for the petitioner.

5. So far as the second ground taken by the learned counsel is concerned, it is a fact that the Magistrate has passed a lengthy order while

dismissing the protest petition. But on perusal of the Case Diary produced by the learned counsel for the Vigilance Department, I find that for

assigning reason while dismissing the protest petition, it is necessary to refer to the materials placed before the Court and accordingly a reasoned

order has to contain all such materials which the learned Special Judge in this case has taken note of. One or two stray observations made by the

learned Special Judge were brought to the notice of this Court but such observations have not affected the ultimate decision of the learned Special

Judge.

6. In view of the above findings, I do not find any merit in this case and accordingly dismiss the same.