

(2013) 03 GAU CK 0016**Gauhati High Court****Case No:** Criminal Petition No. 353 of 2009

Amina Begum (Musstt.) and
Others

APPELLANT**Vs**

Ali Khan (Md.) and Others

RESPONDENT**Date of Decision:** March 5, 2013**Citation:** (2013) 4 GLT 480**Hon'ble Judges:** S.C. Das, J**Bench:** Single Bench

Advocate: J. Roy, Mr. S. Sarma, Mr. R. Hazarika, Ms. P. Pangu, Mr. D.P. Chaliha, Mr. M. Rana and Mr. U.P. Chaliha, for the Appellant; H.R.A. Choudhury, Mr. G. Uddin and Mr. M.J. Quadir, for the Respondent

Judgement

S.C. Das, J.

Heard learned counsel, Mr. U.P. Chaliha for the petitioners and learned counsel, Mr. G. Uddin for the respondents. This is an application, filed u/s 482 of CrPC as well as Section 397 read with Section 401 of CrPC, challenging the order, dated 21.04.2009, passed by learned Judicial Magistrate, First Class, Hojai, Nagaon, Assam, in Case No. CR 101 of 2009.

2. By the impugned order, learned Magistrate has taken cognizance of offence punishable u/s 457 of IPC on the basis of a complaint filed by respondent No. 1, Md. Ali Khan, herein, who is the husband of petitioner No. 1, herein, Musstt. Amina Begum. The impugned order passed by the learned Magistrate reads thus--

21.4.09

Complainant is present. Heard the learned advocate. From the perusal of the complaint petition, the examination of the complainant and the depositions of the C.Ws., I find that, if the case is lodged otherwise, the accused warrant arrest. Hence, I take cognizance of the offence u/s 457 I.P.C. against the accused:

- (1) Kaju Ansari,
- (2) Musstt. Anima Begum,
- (3) Md. Alimuddin Ansari,
- (4) Md. Firuj Ansari.

Issue process accordingly. Complainant shall take step. Fix 23.6.09 for appearance.

The above order makes lot of confusion.

3. As prescribed u/s 190 of the Code of Criminal Procedure, a Magistrate is to take cognizance upon receiving a complaint of facts which constitute the offence or upon a police report of such facts or upon information received from any person other than a police officer, or upon his own knowledge. The Magistrate is not required to examine the complainant and his witnesses before taking cognizance. Simultaneous examination of the complainant or his witnesses, however, is not barred.

4. It is a settled law that taking cognizance should precede the inquiry as required under Chapter XV of the Code of Criminal Procedures. Examination of the complainant and his witnesses is required for the Magistrate to satisfy himself as to whether he should proceed further to issue process against the accused persons pursuant to the cognizance taken.

5. The above order shows that learned Magistrate considered, if the case is lodged, otherwise, the accused warrant arrest and in the last time he directed issue of process. Does it mean issue of process i.e. only a summon or that as he observed a warrant of arrest. It is expected that an order, whenever a Magistrate will be passing, must be clean and clearly reflecting the meaning thereof.

6. The petitioners, herein, did not appear before the Magistrate but resorted to approach this Court by filing the present application u/s 482 of CrPC and, simultaneously u/s 397 read with Section 401 of CrPC.

7. Learned counsel, Mr. U.P. Chaliha appearing for the petitioners has submitted that petitioner No. 1 is the wife of respondent No. 1, who is the complainant of the criminal case and long before filing of the present complaint by respondent No. 1, petitioner No. 1, being badly treated in the husband's house, was compelled to file a complaint for protection under the Domestic Violence Act, 2005 and that was registered as Misc. Case No. 02 of 2009. Learned Magistrate appointed a protection officer pursuant to the petition filed by her and, pursuant to order passed by the Magistrate, "streethans" of petitioner No. 1, which was in the house of the complainant of this case i.e. the respondent No. 1, were also seized in presence of police on 03.02.2009. Thereafter, respondent No. 1, in collusion with his other relatives and family members, hatched a conspiracy and filed a complaint before the Magistrate alleging house breaking and robbery, etc. and filed the present criminal complaint before the Magistrate and the Magistrate, by impugned order, dated

21.04.2009, has taken cognizance without entering into the merit of the complaint and without having an inquiry about the correctness or bona fide of the complaint. Learned counsel, Mr. Chaliha, therefore, prayed for quashing the criminal proceeding in view of the proceeding pending under the Domestic Violence Act.

8. On the other hand, appearing on behalf of the respondents, learned counsel, Mr. G. Uddin has submitted that the fact of Misc. Case No. 02 of 2009, i.e. the case registered under the Domestic Violence Act, was not brought before the Magistrate, who has taken cognizance on the basis of the complaint filed by respondent No. 1. The Magistrate on the basis of the complaint filed by respondent No. 1 and after examination of the complainant and his witnesses directed process against the accused-petitioners of the present case. Since neither the petitioners appeared before the Magistrate nor any issue as submitted by learned counsel of the petitioners before this Court was raised before the learned Magistrate, it was not possible on the part the Magistrate to take all those facts to consideration. Further, the seizure of property under the Domestic Violence Act as alleged was on 03.02.2009, whereas the allegation of the complaint was that the accused persons, i.e., the present petitioners, trespassed in the house of the complainant, i.e. the respondent No. 1, on 14.03.2009 at about 6.30 p.m. and committed theft of the household articles after house breaking and exposed threat to the inmates of the house including the complainant.

9. It might happen that since the petitioner No. 1, who is the wife of respondent No. 1, initiated a proceeding under the Domestic Violence Act, for retaliation, the husband (respondent No. 1) instituted the criminal case. While those facts were not brought before the learned Magistrate by the present petitioners it cannot be expected that the Magistrate will imagine those facts and take it into consideration.

10. I find no justification at all for the petitioner in approaching this Court either u/s 482 of CrPC or u/s 397 of CrPC challenging the order before approaching the magisterial Court at the first instance.

11. In the given facts and circumstances of the case, learned Magistrate also does not seem to be proper in directing warrant of arrest against all the accused persons without having a proper inquiry of the correctness or authenticity of the allegation made in the complaint

12. The order directing warrant of arrest and/or the process against the petitioner by the impugned order dated 21.04.2009 is interfered and set aside.

However, I find no reason at all to interfere in the order of cognizance.

13. Learned Magistrate is directed to examine the complainant and his witnesses afresh and then to issue process, if he is so satisfied, against the accused persons.

14. The petitioners also may appear before the learned Magistrate and place their case for consideration by the learned Magistrate.

15. With the above observation, the criminal petition is allowed and, accordingly, stands disposed of. Send back the LC records along with a copy of the judgment and order.