

(2011) 12 PAT CK 0138

Patna High Court

Case No: Criminal Miscellaneous No. 47518 of 2008

Sushil Kumar Singh and Another

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision: Dec. 12, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 362, 397, 482
- Penal Code, 1860 (IPC) - Section 120B, 147, 148, 149, 302

Citation: (2012) 4 PLJR 474

Hon'ble Judges: Ahsanuddin Amanullah, J

Bench: Single Bench

Advocate: Vinay Ranjan and Mrs. Asha Kumari, for the Appellant; Jharkhandi Upadhyay for the State and M/s Mahendra Thakur, Ujjwal Kumar Mishra for the Opp. Party No. 2, for the Respondent

Final Decision: Allowed

Judgement

Ahsanuddin Amanullah, J.

Heard learned counsel for the petitioners, learned counsel for the State and learned counsel for opposite party no. 2. The present application u/s 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "Code") has been filed for quashing the order dated 29.7.2008 passed by the Chief Judicial Magistrate, Samastipur in G.R. No. 389 of 2000, C.R. No. 1227 of 2003 arising out of Samastipur (M) P.S. Case No. 130 of 2000 dated 27.3.2000 by which he has taken cognizance against the petitioners for offences under Sections 147, 148, 149, 323, 307, 302 and 120B of the Indian Penal Code and issued summons.

2. Learned counsel for the petitioner submits that originally the F.I.R. was lodged against unknown persons and at that time the victim was still alive and later on during the course of treatment he died at P.M.C.H. and thus Section 302 of the Indian Penal Code was subsequently added. Learned counsel submits that the

informant, who is the younger brother of the deceased, had given a written statement to the police stating that he had got telephonic information that his brother has met with an accident and taken to P.M.C.H. He has categorically stated that he would give information later on when he had the same. It appears that the Police after investigation had proceeded against nine persons. Later on a complaint petition on behalf of opposite party no. 2 has been filed in the nature of a protest petition praying for taking cognizance of the remaining 8 accused persons who has not been sent up for trial, even though, according to him, sufficient materials had been produced before the police during investigation. The Chief Judicial Magistrate, Samastipur by order dated 21.8.2003 accepted the final form against the eight accused persons except the sole accused against whom charge-sheet has been submitted and it was further directed that the protest petition filed by the opposite party no. 2 shall proceed. Further, the date for solemn affirmation of opposite party no. 2 was also fixed. The opposite party no. 2 being aggrieved by the order moved this Court in Criminal Miscellaneous No. 31162 of 2003 which was disposed off by order dated 3.8.2004 where it was directed that the Magistrate should proceed with the protest petition treating the same to be a complaint and pass order in accordance with law. The opposite party no. 2 was not satisfied at this stage also and moved before the Hon"ble Apex Court in Criminal Appeal No. 9 of 2006 which came to be disposed off by order dated 2.1.2006 in the following terms:--
Leave granted.

Heard learned counsel for the parties.

The appellant is de facto complainant in a criminal case. According to the appellant, one Pankaj Kumar was done to death by nine persons. A case was registered by the police and the investigation started and ultimately the police filed a final report implicating one accused. The appellant filed a protest petition alleging that all the nine accused should have been implicated as accused in the final report. The grievance of the appellant is that the learned Magistrate has not considered the protest petition and instead directed that the same be treated as a complaint. Aggrieved by the same, the appellant filed a revision and in the revision the High Court declined to interfere with the impugned order.

The Counsel for the appellant submits that the protest petition was not dealt with in accordance with the law. It is argued that even in the final report filed by the police, there are materials to show that the other eight accused has also participated in the commission of crime and the appellant would be in a position to convince the Court that there are sufficient materials to show that they also committed the crime.

In the above circumstances, we direct that the protest petition be considered by the Magistrate and appropriate orders be passed. The petitioner would be at liberty to take further course of action depending on the order that may be passed in the protest petition.

The appeal is disposed of accordingly.

3. A copy of the order dated 2.1.2006 has been produced by learned counsel for opposite party no. 2. Let the same be kept on record.

4. Thereafter, the Chief Judicial Magistrate, Samastipur on 29.7.2008, by a detailed and lengthy order has reviewed the earlier order dated 28.10.2003 and has taken cognizance against all the other eight accused by order dated 29.7.2008. In the end the supplementary case record which was sent to the complaint file was recalled to the G.R. file. It has also been stated in the order that cognizance taken in the case earlier would be applicable against all the accused persons. Learned counsel for the petitioner while assailing the order has submitted that the impugned order dated 29.7.2008 is not sustainable in view of the fact that the admitted position is that the C.J.M. had earlier taken cognizance against only one accused person and accepted the final form against the other eight accused including the petitioner and in that view of the matter the acceptance of the final form against the petitioner and others six accused persons resulted in a final order which could not be altered by the Court in terms of Section 362 of the Code. He further submits that even on merits the protest petition was incompetent to proceed since it was not made as per the requirements of law inasmuch as the same was not signed by the opposite party no. 2, rather it was filed only having the signature of the learned Advocate concerned. He further points out to the inherent contradictions in the statement given by opposite party no. 2 to the Police in the P.M.C.H. soon after the death of his elder brother, i.e., the deceased, and the averments made in the so-called protest petition inasmuch as he is not aware of any incident which could have any relevance with his elder brother being killed in the statement to the police at P.M.C.H., whereas on the other hand, in the protest petition, he states that a day prior to the incident he was at Samastipur and his elder brother has been killed by other persons and it appears that they had beaten him up and thrown him on the road which led to his death. He lastly draws the attention of this Court to the order dated 2.8.2011 in Criminal Miscellaneous No. 44628 of 2008 in which five other similarly situated accused had moved this Court for quashing of the very same order which is impugned in the present proceeding and this Court after considering the facts and circumstances and also taking into consideration the scheme of the Code had quashed the order dated 29.7.2008. The web copy of the order, which has been produced, is being kept on record. It would be relevant to state here that this Court on the earlier occasion while allowing Criminal Miscellaneous No. 44628 of 2008 by order dated 2.8.2011 had neither issued notice to the opposite party no. 2 nor heard him. However, in the present proceeding the opposite party no. 2 has been noticed and has also appeared. The case was heard at some length on 9.12.2011 and has also been heard today at length.

5. Learned counsel for the opposite party no. 2 submits that Section 362 of the Code is not applicable since the order taking cognizance is only an interlocutory order and

thus had not being either a final order or a judgment is not hit by the restriction of Section 362 of the Code which bias the Court not to alter judgment. In the alternative he also submits that if the order impugned is treated to be a final order then the petitioner ought to have moved u/s 397 of the Code in revision, since that was the more appropriate provision of law in the present case. He has also relied upon decision of this Court in the case of [Sanjay Kumar Sah and Others Vs. The State of Bihar and Another](#), in which it has been held that the Magistrate has the power to differ with the police report and take cognizance against others also who were not sent up for trial after differing from the final form. Learned counsel has finally submitted that on perusal of the order passed by the Hon"ble Apex Court it would be clear that the C.J.M. has acted in accordance with law as per the terms of the order of the Hon"ble Apex Court.

6. Considering the facts and circumstances of this case this Court is inclined to agree with the submission advanced on behalf of the petitioners. Once the C.J.M. by order dated 21.8.2003 had accepted final form against the petitioners and other six accused, as far as the case arising out of the F.I.R. of the police being the G.R. Case, this order was the final order with regard to the petitioners. The consideration was then to be of the protest petition which is obvious from the order dated 21.8.2003 itself which fixed for taking evidence of the opposite party no. 2 on solemn affirmation. This Court earlier in Criminal Miscellaneous No. 31162 of 2003 by order dated 3.8.2004 as well as the Hon"ble Apex Court in order dated 2.1.2006 in Criminal Appeal No. 9 of 2006 has clearly used the expression that the "protest petition" shall be considered by the Magistrate and appropriate order be passed and the petitioner was given further liberty to take action depending on the order that may be passed in the protest petition. The law in this regard is quite settled by now inasmuch as once the police report/final form is accepted by the Court, as far as the police case and the G.R. Case arising out of the same is concerned, for all practical purposes, stands concluded. However, the law also stipulates that if there is a protest petition, it is to be treated as a complaint petition which proceeds as per the relevant provisions under the Code. The said complaint case is a distinct and separate case compared to the original F.I.R. and G.R. Case. In that view of the matter, this Court is in agreement with the submissions advanced by learned counsel for the petitioners that the order impugned is also hit by the restriction of Section 362 of the Code.

7. As far as the order passed in the case of Sanjay Kumar Sah (supra) is concerned the same is not applicable to the facts and circumstances of the present case. In the said case the Magistrate proceeded to take cognizance in spite of final form submitted by the police on the basis of materials in the police papers including the case diary and thus the Court held that the same was in accordance with law. Here the case is quite different. The Chief Judicial Magistrate has accepted the final form submitted by the police with regard to the petitioners and six other accused and had directed that the protest petition would be considered and accordingly the date had also been fixed for examination of opposite party no. 2 on solemn affirmation. Thus,

the said case is not of much help to the opposite party no. 2 in the present case. The view expressed hereinabove is also the view in sum and substance of the Coordinate Bench of this Court in its order dated 2.8.2011 passed in Criminal Miscellaneous No. 44628 of 2008.

8. In view of the discussions made hereinabove, the order dated 29.7.2008 passed by the C.J.M., Samastipur in G.R. No. 389 of 2000, C.R. No. 1227 of 2003 is hereby quashed. The natural consequences in law shall follow. The petition stands allowed.