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(2016) 06 PAT CK 0100

PATNA HIGH COURT

Case No: Criminal Miscellaneous No. 50748 of 2013 (Arising Out of PS.Case No. -131 Year-2012 Thana - Rajaun District - Banka).

Ajay Kumar Mandal Son of Sahdeo Mandal, Resident of Village - Singhnan, P.S.- Rajaun and District - Banka - Petitioner @HASH The State of Bihar - Opposite Party

APPELLANT

Vs

RESPONDENT

Date of Decision: June 28, 2016

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 203, Section 210
- Penal Code, 1860 (IPC) - Section 409, Section 420, Section 467, Section 468

Citation: (2016) 4 ECrC 233 : (2017) 1 PCCR 148 : (2016) 4 PLJR 650

Hon'ble Judges: Gopal Prasad, J.

Bench: Single Bench

Advocate: Mr. Rajib Ranjan Jha, Advocate, for the Petitioner; Mr. Upendra Kumar, A.P.P, for the Opposite Party

Final Decision: Allowed

Judgement

Mr. Gopal Prasad, J.(Oral) - This petition is directed against the order dated 17.10.2013 passed in Complaint Case No. 1692 of 2010 arising out of Rajaun P.S. Case No. 131 of 2012 by the learned Chief Judicial Magistrate, Banka, whereby and where under learned court below has found that there is no sufficient ground to initiate proceeding against the opposite party no. 2.

2. The fact of the case in narrow compass that the petitioner filed a Complaint bearing Complaint Case No. 1692 of 2010 on 07.09.2010 against opposite party no. 2 for offence under Sections 409,420, 467, 468 and 471 of Indian Penal Code. The case of the prosecution in the complaint that petitioner was working on the post of Clerk in the G.P. Jha Girls High School, Singhnan since 12.02.2005. The opposite party no. 2 was also working as Assistant Teacher since 28.09.1994. The Government had granted aid to the said school for making payment of salary to the teaching and non-teaching staff who were working in the school. It is alleged that salary of the petitioner and others employees was not paid. The petitioner learnt that opposite party no. 2 has illegally formed a new committee and prepared the list of teaching and non-teaching staff and wrongly misappropriated the amount granted for payment of salary to the staff working in the school. Further case is that the matter was reported to the President Sri Sudhakar Jha. On 07.07.2010, the President received information through R.T.I. Act and found that opposite party no. 2 after forming a fake committee and showing wrong employment on 26.03.2008 had dishonestly misappropriated Rs. 4,45,800/- and the petitioner and others could not get any amount.

3. On the complaint, the learned Chief Judicial Magistrate had called for a report from the Officer-in-Charge Rajaun P.S. under Section 210 Cr.PC. The Officer-in-Charge had submitted report. After receiving the report the learned Magistrate after examining the complainant on Solemn Affirmation and examined three witnesses adduced on behalf of the complainant as Witness No. 1 namely Sudhakar Jha, Witness No. 2 namely Prem Kumar Jha and Witness No. 3 Durga Prasad Datta dismissed the complaint taking into consideration the statement of the complainant on Solemn Affirmation and statement of witnesses as well as report of the Officer-in-Charge on the ground that enquiry report submitted by the police shows that the complainant was never an employee of the said school and as such there is no question of making payment of remuneration to him out of the allotment provided by the Government. Further taking into consideration the materials available on record, statement of complainant and witnesses and enquiry report, hold that no prima facie case is made out and hence, dismissed the complaint under Section 203 of Cr.P.C.

4. The said order of dismissal of the complaint, the complainant was challenged before the revisional court the court of 1st Additional Sessions Judge, Banka, in Cr. Revision No. 216 of 2011. However, revisional court observed in its order dated 16.06.2012 in paragraph 6 "that Section 210 Cr.P.C. relates to an exigency for calling report when it appears to Magistrate in a complaint case that police investigation in respect of the same offence is going on. Hence, the learned lower court misdirected itself in calling report under Section 210 Cr.P.C. when no police investigation was going on in any police case in respect of same offence. Hence, in the fact and circumstance, there is no occasion to call report under Section 210 Cr.P.C. but the police surprisingly gave report under Section 210 Cr.P.C. that accused has not defalcated or misappropriated the amount. However the report may be treated as report in an enquiry under Section 202 of Cr.P.C. It is further

held that order passed for report from the police under Section 210 Cr.P.C. is also not an order passed in an enquiry under Section 202 Cr.P.C. and held that the learned Chief Judicial Magistrate has not earlier ordered for an enquiry under Section 202 Cr.P.C. The learned Additional Sessions Judge held that the learned Chief Judicial Magistrate, Banka, has ignored the provisions of law and so interference is required accordingly, set aside the order of the learned Chief Judicial Magistrate. So interference is required. The learned Chief Judicial Magistrate will proceed with the case in accordance with law".

5. Learned Magistrate after receipt of the order passed in Cr.Revision No. 216 of 2011, by order dated 09.08.2012 sent the complaint petition to the P.S. concerned under Section 156(3) of the Cr.P.C. for lodging an F.I.R. and investigation and to submit Final Form in accordance with law. The complainant was directed to furnish the copies of complaint petition for necessary compliance. Subsequently, police instituted F.I.R. and investigated the case and finally submitted Final Form as a mistake of fact. After submission of Final Form, the learned Magistrate passed the impugned order dated 17.10.2013, observed that police submitted final report after investigation showing the case "mistake of fact" and after perused of the record including the case diary held that there is no sufficient ground to initiate proceeding against the accused persons named in the F.I.R.

6. Hence, it is apparent that earlier the Complaint Case No. 1692 of 2010 has been dismissed against which a revision preferred and the revisional court directed to proceed in accordance with law. However, the then learned Chief Judicial Magistrate passed an order directing the police to lodge a police case under Section 156(3) of Cr.P.C. and to investigate the case and in consequence, the police after investigation found the case "mistake of fact". The learned Magistrate on police report held that there is no need to proceed with protest complaint dated 04.10.2012 of the informant in view of police report.

7. Learned counsel for the petitioner however challenged the order dated 17.10.2013 and submits that there is sufficient material to support the allegation and at this stage the learned Magistrate will not meticulously enter into the complaint in detail. It has further been contended that dismissal of the complaint by the Magistrate is cryptic and non-speaking order and has placed reliance upon decision reported in 2005(12) SCC 229 that Magistrate is require to pass speaking order.

8. However, taking into consideration the fact and circumstance, it is apparent that a complaint was filed before the Magistrate. On complaint, the Magistrate may have three options (1) either to send the complaint without taking cognizance for lodging a F.I.R. under Section 156(3) of Cr.P.C. for investigation by the police, or (2) proceed to take cognizance, to examine on oath the complainant and his witnesses, if any, thereafter, he may have option (a) issue process, if he, think prima facie offence is made out (b) he may dismiss the complaint under Section 203 of Cr.P.C. The third option that the Magistrate may 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 person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for

proceeding and then take action upon receipt of the report.

9. However, it is pertinent to mention that when procedure is contemplated under Section 200 Cr.P.C. it cannot be deviated by attaching some other procedure which is not prescribed nor he can awaiting the report, proceed with the complaint.

10. Further Section 210 of Cr.P.C. provides that when a complaint case is filed and it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial of a complaint by the Magistrate, the Magistrate shall stay the proceedings of such inquiry or trial of complaint case and call for a report regarding the matter from the police officer conducting the investigation in relation to the same offence.

11. Now coming to the facts and circumstances of the case, at hand, it is apparent that a complaint petition was filed by the petitioner. In the complaint, the learned Magistrate calls for a report under Section 210 of Cr.P.C. However, the report under Section 210 Cr.P.C. can only be called upon if it appears to Magistrate that a police case is being investigated by police in relation to same matter for which the complainant has been filed the complaint. However, having regard to the fact that there was no police case with respect to same offence and hence, the Magistrate had no jurisdiction to call for report under Section 210 Cr.P.C. when no investigation was pending.

12. Having regard to the fact that since there was no investigation in relation to the same offence made out in the complaint, there was no occasion for the Magistrate to call for a report under Section 210 of Cr.P.C. when no investigation is pending. However, the report given by the police that the appellant is falsely implicated has also not in consonance with as report required under Section 210 of Cr.P.C. as the report require the fact only whether the investigation is pending.

13. The said order of dismissing the complaint was challenged before the learned Additional Sessions Judge and learned Additional Sessions judge set aside the order on the ground that there was no exigency to call for a report under Section 210 Cr.P.C. as no police investigation in regard to said offence was going on. However, the learned Additional Sessions Judge rightly allowed the revision setting aside the order of lower court with observation to proceed with the case in accordance with law.

14. However, learned revisional court while setting aside the order did not go into the merit of the case but only set aside the order of the learned Magistrate on the ground of procedural lapses that learned Magistrate consider the report of the police which was uncalled for as there was no occasion to call for a report under Section 210 Cr.P.C. as there was nothing to appear that police investigation is going on in relation to same offence. It is pertinent to mention under Section 210 Cr.P.C. only placed when an investigation with regard to the same offence is pending before the police on a police

case and when a complaint has been filed with regard to the same offence then Magistrate on enquiry of the complaint, must stayed the complaint till receipt of the police report in regard to the same offence. Since, there was no investigation was going on in police case in relation to the occurrence for complaint was pending, hence, calling for a report under Section 210 Cr.P.C. does not arise.

15. However, since on the complaint, the Magistrate proceeded with the complaint and examined the complainant on S.A. and also examined the witnesses and passed the order after taking into consideration the report of the police under Section 210 of Cr.P.C. when no investigation was pending before police in connected police case which was challenged in revisional court and revisional court set aside the order and remanded back the case to proceed in accordance with law. However, learned Chief Judicial Magistrate after receipt of the order passed the order for lodging the case under Section 156(3) of Cr.P.C. and F.I.R. lodged. Police investigated the case and after investigation, police submitted the report and learned Magistrate on the said report accepted the Final Form as a case of mistake of fact.

16. However, when a complaint is filed, the Magistrate proceeds to take cognizance with examination of complainant on Solemn Affirmation and examination of the witnesses then he proceeded with enquiry under Section 202 Cr.P.C. When the Magistrate proceed with enquiry under Section 202 Cr.P.C. he has only option either to dismiss the complaint under Section 203 Cr.P.C. or issue process against the accused under Section 204 Cr.P.C., but he has no option to order to lodge a case under Section 156(3) Cr.P.C. and to enquiry. The position remain same if the complaint is dismiss under Section 203 Cr.P.C. and revision is preferred and the revisional court set aside the order passed under Section 203 Cr.P.C and remand the case for consideration for further enquiry then the case is still at the stage of enquiry under Section 202 Cr.P.C. Hence, the Magistrate under the fact and circumstance of the case can either pass order under Section 203 Cr.P.C. or 204 Cr.P.C. or proceed from a stage of enquiry under Section 202 Cr.P.C., but the Magistrate had no option or jurisdiction to pass order under Section 156(3) Cr.P.C. for instituting an F.I.R. and police has no jurisdiction to proceed with investigation. (A.I.R. 1964 SC 1541).

17. Learned Magistrate even after remanded of the case could have taking into consideration the statement of the complainant and witnesses ignore the report under Section 202 Cr.P.C. and if he could have satisfied with those statements of the complainant and witnesses he may have right to call for police report as it is apparent that procedure prescribed under Sections 200 and 202 of Cr.P.C. that filing on the complaint, the Magistrate have examined the complainant on S.A. and its witnesses and if he satisfy he may issue process against the accused persons or he may dismiss the complaint or if he is not satisfy then he may call for report from the police under Section 202 Cr.P.C. However, the Magistrate had no option to pass order under Section 156 Cr.P.C. for lodging a F.I.R. when he proceeded with the enquiry under Section 202 of Cr.P.C. or he could not order to lodge F.I.R. under Section 156(3) of Cr.P.C. and action required to be

followed as the result of enquiry and either dismissal of the complaint under Section 203 of Cr.P.C. or issuing process under Section 204 Cr.P.C.

18. Hence having regard to the fact that once the Magistrate enter into enquiry under Section 200 and 202 of Cr.P.C. on a complaint, he can not order for re-investigation rather he may call for a report from the police under Section 202 Cr.P.C. The learned Magistrate has again made enquiry under Section 202 of Cr.P.C. and examined the complainant and witnesses.

19. Hence, once the Magistrate has proceeded with the enquiry even after order of revisional court, the Magistrate could have proceeded on the basis of said enquiry and may have passed the order issuing process under Section 204 of Cr.P.C. or dismissing the complaint under Section 203 Cr.P.C. However, procedure adopted by the learned Magistrate passing order for lodging F.I.R. under Section 156(3) of Cr.P.C. after remand of the complaint case is not sustainable.

20. The learned Magistrate had no jurisdiction to order for institution of F.I.R. under Section 156 (3) of Cr.P.C. when he was amidst enquiry under Section 202 of Cr.P.C. and hence lodging of F.I.R. and accepting Final Form and dismissing the complaint on report under Section 173(2) of Cr.P.C. filed in F.I.R. lodged in order under Section 156(3) of Cr.P.C. is not sustainable. This view is supported by decision reported in A.I.R. 1964 SC 1541. The Magistrate has only jurisdiction and option either to pass order on the statement of the complainant on Solemn Affirmation and the statement of witnesses examined under Section 202 of Cr.P.C. and if he requires, he may proceed under enquiry under Section 202 of Cr.P.C. either to call report from the police to conclude the complaint either under Section 203 or 204 of Cr.P.C. Since the Magistrate proceeded to order for lodging F.I.R. amidst enquiry under Section 202 of Cr.P.C., the police lodged the F.I.R. and after investigation submitted report under Section 173(2) of Cr.P.C. which was conducted and accepted, as no material to proceed is not sustainable as Magistrate had no jurisdiction to order of lodging F.I.R. under Section 156(3) of Cr.P.C.

21. Hence the impugned order passed by the learned Judicial Magistrate accepting the Final Form on the police report is not sustainable and set aside. The petition is allowed.

22. The case is remanded back to the lower court to pass order in accordance with law.