
GIRINDRA MAHANTA and ANR. Vs THE STATE OF ASSAM and ANR.**Crl.Pet. 665 of 2017**

Court: GAUHATI HIGH COURT**Date of Decision:** March 6, 2018**Acts Referred:**

Code of Civil Procedure, 1908 " Section 420, 482#Code Of Criminal Procedure, 1973 " Section 190, 156(3), 154(1), 201, 210, 482#Indian Penal Code, 1860 " Section 34, 406, 420, 506

Hon'ble Judges: MIR ALFAZ ALI**Bench:** Single Bench**Final Decision:** Dismissed

Judgement

1. Heard, Mr. N.N.B. Choudhury, learned counsel for the petitioners and Mr. A.D. Choudhury, learned counsel for the

respondent.

2. By this petition under Section 482 CPC, the petitioners have prayed for quashing the order dated 07.04.2017, whereby the learned Judicial

Magistrate, First Class, Kamrup took cognizance and issued process against the petitioners and also the proceeding in Complaint Case No. 476C/2017.

3. The respondent No. 2 herein lodged a complaint before the Magistrate praying for sending the same to police under Section 156 (3) CrPC for

registering a case. Learned Judicial Magistrate did not send the complaint to police, rather, took cognizance and issued process. Against the said order

of taking cognizance, the petitioners have filed the instant petition.

4. Learned counsel for the petitioner Mr. N.N.B. Choudhury submits that while the complaint was lodged under Section 156 (3) CrPC with a prayer

to send the same to police, either learned Judicial Magistrate should to have send the complaint to police or he should have return the complaint. Mr.

Choudhury further contends that an FIR was also lodged by the same complainant, alleging the identical facts along with certain other allegations and

submits that since there was a police case and investigation was going on, on the same subject, learned Judicial Magistrate ought to have stayed the

proceeding under Section 210 CrPC. The third limb of argument advanced by the learned counsel is that the complaint has not made out any offence.

5. Learned counsel Mr. A.D. Choudhury, representing the respondent No. 2 submits that the allegation made in the complaint clearly makes out a

prima facie case for the offence alleged, and therefore, there is no question of quashing the complaint, inasmuch as, no roving enquiry as to the merit

of the case is called for at this stage.

6. The first two limb of argument advanced by the learned counsel for the petitioners appears to be misplaced. The Apex Court as relied by the

learned counsel for the petitioner in Priyanka Srivastava Vs. State of U.P. reported in 2015 (2) JCC 974 laid down that when a complaint is filed

before a Magistrate praying for sending it to police, the Magistrate is expected to apply his mind to ascertain whether the complaint deserves to be

send to police under Section 156(3) CrPC for registering a case. Magistrate should not send the complaint to police for registering case as a matter of

routine. The Apex Court in Priyanka Srivastava (supra) held that before sending the complaint to police under Section 156(3), the complainant must

comply with Section 154 (1) and 154 (3) CrPC and the complaint should also accompany an affidavit to that effect. Unless these requirements are

satisfied, the Magistrate cannot simply send the complaint to police under Section 156 (3) CrPC for registering a case. In the instant case, the

impugned order transpires that the pre-conditions required for sending a complaint to police under Section 156 (3) CrPC were not satisfied and

therefore, the learned Trial Court did not send the complaint to police and took cognizance himself and thereby learned Magistrate did not commit any

irregularity.

7. Mr. Choudhury also submits that when the complaint was not send to police, the learned Magistrate ought to have returned the complaint. I do not

find any force in such submission, inasmuch as, Section 156(3) CrPC is only an enabling provision, which empowers the Magistrate to order an

investigation of a case, which the police is otherwise empowered to investigate without permission or without being sent by Magistrate, if the offence

are cognizable. The enabling provision under Section 156(3) CrPC only gives a discretion to the Magistrate. If the Magistrate finds that a complaint

does not deserve to be sent to police, he can very well take cognizance.

8. It is to be borne in mind that power under Section 156(3) can be exercise only when the Magistrate is empowered under Section 190 CrPC to take

cognizance of the offence. When the Magistrate is empowered to take cognizance, there can be no question of returning the complaint. Question of

returning the complaint under Section 201 CrPC may arises only when the Magistrate is not competent to take cognizance. Therefore, taking

cognizance and by not sending the complaint to police under Section 156 (3), no irregularity has been committed by the learned Magistrate.

9. As to the submission regarding stay of the proceeding under Section 210 CrPC, it is apparent from the petition itself that a police case was lodged

subsequent to filing the present complaint. Apparently, when the learned Magistrate took cognizance, no FIR was lodged nor any police investigation

was going on, and therefore, there was no occasion for the Magistrate to exercise power under Section 210 CrPC. It is also revealed from the

submission, that the petitioner also did not file any application under Section 210 CrPC before the Magistrate for stay of the proceeding in view of

pendency of the police case allegedly on the same subject. In that view of the matter, when at the time of taking cognizance on the complaint, police

case was not in existence and the FIR was subsequently lodged, the order passed by the learned Trial Court also cannot be faulted for not exercising

the power under Section 210 CrPC.

10. Placing reliance on a decision of the Apex Court in Hari Prasad Chamaria Vs. Bishun Kumar Surekha reported in (1973) 2 SCC 823 and Pran

Jyoti Bhuyan Vs. State of Assam reported in 2014 (1) GLT 887, learned counsel for the petitioner submits that the complaint did not disclose the initial

deception by the petitioner and for that matter, no offence under Section 420 IPC was made out. Learned counsel further contends that the allegations

made in the complaint discloses merely a breach of contract, which is a civil wrong, for which civil remedy is available and the complainant sought to

give criminal flavour to a civil dispute with ulterior motive. It is the settled position that merely because, the facts alleged in the complaint discloses civil

wrong, for which civil remedy is available, cannot be a ground for throwing out a complaint, if the same set of facts also makes out a criminal wrong

or offence. The crucial point to be considered is, whether the allegations made in the complaint makes out any offence. In case, the facts alleged in

the complaint makes out an offence, even if civil remedy is available, that cannot be a ground for quashing the complaint.

11. Keeping in view the above proposition of law, let me now turn to the allegations made in the complaint.

12. The allegation made in the complaint was that the petitioner No. 2 entered into an agreement with the respondent No. 2 to transfer possession of a

plot of land for a consideration of Rs. 6 lakhs and initially paid Rs. 2 lakhs. However, as per the agreement, the petitioner did not hand over the

possession of the land to the respondent No. 2 and asked for ₹, more value and there was negotiation and the value was fixed at Rs. 8 lakhs. The

respondent No. 2 paid additional Rs. 6 lakhs. However, even after receiving the said amount, the petitioner No. 1 did not hand over the possession of

the land. Rather, the petitioner No. 1 hatched a conspiracy with the petitioner No. 2 for not handing over the possession of the land and to

misappropriate the money. When the respondent asked the petitioner to hand over the land, they refused to hand over the possession of the land or the

money and also threatened him with dire consequence. It is also alleged in the complaint, that on the pretext of making some correction in the

consideration amount, the petitioner No. 1 took back the agreement and subsequently refused to return the same to the respondent No. 2.

13. On the basis of the above allegations, learned Judicial Magistrate took cognizance under Section 420/406/506/34 IPC. What is evident from the

allegations made in the complaint is that two sets of allegations were made. One part is with regard to taking money and not handing over the

possession and also taking away the deed of agreement on false pretext. The other part of the allegations made in the complaint was that the

petitioners criminally intimidated the respondent No. 2. Going by the allegation as a whole in the complaint, it is difficult to hold that no offence at all

has been made out. The Apex Court in the celebrated judgment on State of Haryana Vs. Bhajan Lal reported in 1992 (suppl 1) SCC 335 and also in

R.P. Kapoor Vs. State of Punjab reported in AIR 1960 SC 866, while enumerating the categories of cases where the court should and may exercise

inherent power to quash the proceeding, held that where the allegation made in the complaint or FIR taken at their face value and accepted in their

entirety do not constitute any offence or make out a case against the accused, the High Court can and should exercise the inherent power under

Section 482 CrPC. It is also settled position, that while exercising inherent power under Section 482 CrPC for quashing a complaint or FIR, the High

Court cannot enter into a roving enquiry as to the merit of the case. If the plain and simple allegations made in the FIR or the complaint makes out any

offence, power under Section 482 CrPC should not be exercised to quash the proceeding. The Apex Court in Bhajanlal & Ors (supra) case, also

cautioned, that inherent power to quash a criminal proceeding should be exercise sparingly and in rarest of the rare cases.

14. Thus, having regard to the scope of interference with the criminal proceeding at the threshold in exercise of inherent power under Section 482

CrPC and the allegations made in the complaint in the instant case, I am unable to persuade myself to concede with the submission made by the

learned counsel for the petitioners that the complaint did not make out any offence.

15. In view of the above, I do not any find merit in the instant petition and accordingly, it is dismissed. However, it is made clear that the learned Trial

Court while trying the offence shall not be influenced by any of the observation made hereinabove.