

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.326 of 2013

Arising Out of PS.Case No. -127 Year- 2009 Thana -KHAGARIA COMPALINT CASE District- KHAGARIA

1. Dinesh Kumar Gupta @ Dinesh Gupta

2. Umesh Prasad Gupta @ Umesh Gupta

Both sons of Late Mahavir Prasad Gupta R/o Village - Mansi, P.S. Mansi,
District - Khagaria

.... Petitioners

Versus

1. The State of Bihar

2. Dewki Devi, W/o Wakil Das, R/o - Chak Hussaini, P.S.- Mansi, District -
Khagaria

.... Opposite Parties

Appearance :

For the Petitioner/s : Mr. Ajay Kumar Thakur, Advocate

Mr. Ravi Ranjan, Advocate

For the State : Mr. Binod Kumar-3, APP

For the Opposite Party No.2: Mr. Shiv Sagar Sharma, Advocate

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 19-05-2015

Heard learned counsel for the petitioners, learned
counsel for the State and learned counsel for the opposite party no.

2.

2. This application under Section 482 of the Code of
Criminal Procedure has been filed for quashing the order dated
26.04.2012 passed by the learned Judicial Magistrate, 1st Class,

Khagaria in Complaint Case No. 127C of 2009 by which the petitioners have been summoned to face trial for the offences punishable under Sections 365 and 120B of the Indian Penal Code.

3. The prosecution case, in brief, according to the Deoki Devi (O.P. No. 2) is that on 04.07.2005, at about 7.00 p.m., while she along with her husband and children were at their house, the accused Dinesh Gupta (petitioner no. 1), Umesh Prasad Gupta (petitioner no. 2), Randhir Kumar and Ramdeo Yadav came and took away her husband Wakil Das on the pretext that one Ganesh Gupta has called him. When her husband did not return till next morning, she went to the house of Ganesh Gupta in order to know his whereabouts, but he refused to meet her. She also went to the house of other accused persons, but they evaded to give any proper reply. She has stated that on 7.8.2005 accused Ganesh Gupta had tried to outrage her modesty for which complaint Case No. 638C of 2005 was filed which is pending in the Court. She claimed that the accused persons might have kidnapped or killed her husband in order to put pressure upon her to compound the complaint case. She further claimed that though belonging to a downtrodden community, she is an elected ward councilor, whereas the accused Ganesh Gupta is Mukhia of the Panchayat.

4. On the basis of the aforesaid complaint, Complaint



Case No. 127C of 2009 was instituted. The complainant was examined on solemn affirmation and in support of the allegation made in the complaint, three witnesses, namely, Randhir Kumar, Jitendra Kumar and Chhotu Kumar were examined in course of inquiry conducted under Section 202 of the Code of Criminal Procedure (For short 'the Code'), whereafter the impugned order dated 26.04.2012 has been passed by the Magistrate.

5. It has been submitted that earlier to this complaint, Complaint Case No. 747C of 2005 had been filed in Court which was referred to the police in exercise of powers conferred under Section 156(3) of the Code for investigation, pursuant to which, Chautham (Mansi) P.S. Case No. 215 of 2005 was registered. In the said police case, after completion of investigation, final report was submitted on 21st July, 2006 holding the prosecution case to be false. The final report submitted by the investigating officer was accepted by the learned Chief Judicial Magistrate, Khagaria vide order dated 30th November, 2006.

6. It has further been contended that during pendency of investigation of the case, opposite party no. 2 had filed an application in the court of Chief Judicial Magistrate, Khagaria in the form of protest. While accepting the police report dated 21st July, 2006 vide order dated 30th November, 2006, the learned Chief

Judicial Magistrate, Khagaria had directed the protest petition to be registered as a complaint. Accordingly, Complaint Case No. 945C of 2006 was registered in which the complainant and witnesses were examined in course of inquiry.

7. Taking into consideration the complaint, the statement of the complainant on solemn affirmation and the statement of witnesses examined in course of inquiry, the Judicial Magistrate, 1st Class, Khagaria dismissed the Complaint Case No. 945C of 2006 vide order dated 22nd January, 2009 in exercise of the powers conferred under Section 203 of the Code.

8. It is submitted that after dismissal of the aforesaid complaint, the present Complaint Case No. 127(C) of 2009 was filed before the learned Chief Judicial Magistrate, Khagaria on 02.02.2009 suppressing the fact that the earlier complaint bearing No. 945(C) of 2006 was dismissed under Section 203 of the Code.

9. It has further been contended that even in the present complaint, the allegations are exactly identical to that of the earlier one. The witnesses, who were examined, are sons of the complainant.

10. Learned counsel for the petitioners has further submitted that the impugned order dated 26.04.2012 is bad in law as well as on facts. A second complaint can lie only on new facts. The

earlier complaint was dismissed after recording the evidence of the complainant and three inquiry witnesses on merits in exercise of powers conferred under Section 203 of the Code. After dismissal of the complaint on merits a second complaint on the same facts ought not to have been entertained.

11. He further submits that the order is also bad for the reason that the opposite party no. 2 has suppressed the vital fact that the earlier complaint on the same set of allegations had already been dismissed by the learned Chief Judicial Magistrate, Khagaria.

12. On the other hand, learned counsel for the State has submitted that a second complaint is permissible in law and there is no illegality if the Court has taken cognizance of the offence after recording the evidence of the complainant and the inquiry witnesses.

13. Similarly, learned counsel for the opposite party no. 2 has submitted that where the first complaint was dismissed without taking cognizance of the offence, second complaint on the same fact would not be barred. He has further submitted that since the lawyer for the complainant may not be aware of the dismissal of the earlier complaint, the fact regarding dismissal of the complaint could not have been brought to the notice of the Court. According to him, this cannot be a ground for holding the order passed by the

learned Chief Judicial Magistrate summoning the petitioners to be bad in law.

14. I have heard respective counsel for the parties and perused the record.

15. It would be evident from record that initially Complaint Case No. 747(C) of 2005 was filed by the opposite party no. 2 before the learned Chief Judicial Magistrate, Khagaria and it was referred to the police under Section 156(3) of the Code for institution of first information report. The police investigated the case and submitted final report holding the case to be false. A protest petition was filed when the matter was pending before the police for investigation. The said protest petition was treated as complaint while accepting the final report submitted by the police and, accordingly, Complaint Case No. 945(C) of 2005 was registered.

16. The complainant got her statement recorded on solemn affirmation and three of her sons were examined in course of inquiry in support of the complaint. Thereafter, the learned Judicial Magistrate, 1st Class, Khagaria dismissed the complaint vide order dated 22.01.2009 in exercise of powers conferred under Section 203 of the Code. The operative part of the aforementioned order dated 22.01.2009 reads as under:-



“6. From perusal of the complaint petition, S.A. of the complainant and evidences of the inquiry witnesses, I do not find any sufficient ground to proceed with the case against the accused persons. All the inquiry witnesses are minor sons of the complainant and they all are very interested witnesses. The evidences of the complainant and her sons seem to be highly improbable and as such no prima facie case is made out.

7. It is also strange that as per complaint petition the occurrence took place on 4.9.2005 and the Complaint Case No. 747 of 2005 was filed on 9.9.2005 i.e. after five days and no cogent explanation of delayed filing has been given in the complaint petition or whispered during evidences. It is worth mention here that in paragraph nos. 21, 22 and 23 of the case diary, it is clearly mentioned that multiple criminal cases have been filed against the husband of the complainant and he is absconding in some of the cases. It is observed by the police that the husband of the complainant might have gone away somewhere to avoid his arrest, which possibility cannot be ruled out.

8. On the basis of the above discussions, facts, circumstances and reasons, this complaint case is hereby dismissed u/s 203 Cr. P.C.”

17. The order dated 22.01.2009 was not challenged before any Court. Hence, it attained finality. The petitioner has



suppressed the fact of dismissal of the earlier complaint and filed another complaint vide Complaint Case No. 127(C) of 2009 in the Court of Chief Judicial Magistrate, Khagaria on the same allegation. In the said complaint, after perusing the complaint petition, the statement of the complainant on oath as well as the statement of witnesses recorded under Section 202 of the Code, the learned Judicial Magistrate, 1st Class, Khagaria has summoned the accused persons including the two petitioners for facing trial for the offences punishable under Sections 365 and 120B of the Indian Penal Code.

18. It is well settled that there is no statutory bar in filing a second complaint on the same facts. In a case, where previous complaint is dismissed without assigning any reasons, in a second complaint, the Magistrate may take cognizance of an offence and issue process under Section 204 of the Code if there is sufficient ground for proceeding. However, a second complaint cannot be maintained after a decision has been given against the complainant in a previous matter upon a full consideration of the case. Further, a second complaint on the same facts could be entertained only in exceptional circumstances, such as, where the previous order was passed on an incomplete record or on a misunderstanding of the nature of complaint or it was manifestly absurd, unjust or where new facts, which could not with reasonable diligence, have been

brought on record in the previous proceeding, have been adduced.

19. In **Parmatha Nath Talukdar & another vs. Saroj Ranjan Sarkar [AIR 1962 SC 876]** a three Judge Bench of the Supreme Court considered the question of fresh evidence on which a second complaint on the same facts may be entertained when first complaint is dismissed. It held in paragraph nos. 50, 59 & 61 as under:-

“50. Taking first the question of fresh evidence, the view of some of the High Courts that it should be such that it could not with reasonable diligence have been adduced is, in our opinion, a correct view of the law. It cannot be the law that the complainant may first place before the Magistrate some of the facts and evidence in his possession and if he fails he can then adduce some more evidence and so on. That in our opinion, is not a correct view of the law.

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59. Can it be said in these circumstances that there has been a manifest error resulting in the



passing of an unjust order? That, in our opinion, has not been made out. The order of Debabrata Mookerjee J., who reviewed the findings of the previous Chief Presidency Magistrate, shows that the criticism that that learned Magistrate did not consider the whole evidence is not justified. Taking the evidence into consideration he came to the conclusion that there was no ground to proceed and, therefore, refused to issue process. In his opinion the evidence was not worthy of credit and he was not satisfied with the correctness of the complaint and dismissed it as he was entitled to do on those findings. See *Gulab Khan v. Ghulam Mohammad Khan*, AIR 1927 Lah. 80 which was approved in 1961(1) SCR 1 : (AIR 1960 SC 1113). In the circumstances the order made by the previous Chief Presidency Magistrate was not in any manner manifestly absurd, unjust or foolish, nor can it be said that the Magistrate ignored any principles which were necessary to apply under Ss. 202 & 203 of the Criminal Procedure Code nor is the order contrary to what was said in 1958 SCR 618 at p. 634 : (AIR 1958 SC 97 at p. 105). That was a case in which the rule in regard to commitment proceedings and the power of the Committing Magistrate to commit was discussed and the expression “sufficient grounds” in Ss. 209 210 and 213 of the Code of Criminal Procedure was



interpreted. That was not a case dealing with the powers of the Magistrate under Ss. 202 and 203 which was specifically raised and decided in *Vadilal Panchal's* case 1961 (1) SCR 1 : (AIR 1960 SC 1113). In *Ramgopal Ganpatrai Ruia's* case 1958 SCR 618 : (AIR 1958 SC 97) the following observations of Sinha J. (as he then was), in regard to the expression “sufficient grounds” are pertinent:

“The controversy has centered round interpretation of the words ‘sufficient grounds’, occurring in the relevant sections of the Code, set out above. In the earliest case of *Lachman v. Juala*, ILR 5 All 161 decided by Mr. Justice Mahmood in the Allahabad High Court, governed by S. 195 of the Criminal Procedure Code of 1872 (Act No. X of 1872), the eminent judge took the view that the expression ‘sufficient grounds’ has to be understood in a wide sense including the power of the magistrate to weigh evidence. In that view of the matter, he ruled that if in the opinion of the magistrate, the evidence against the accused ‘cannot possibly justify a conviction’ there was nothing in the Code to prevent the magistrate from discharging the accused even though the evidence consisted of statements of witnesses who claimed to be eye-witnesses, but whom the magistrate entirely discredited. He also held that the High Court could interfere only if it



came to the conclusion that the magistrate had committed a material error in discharging the accused or had illegally or improperly underrated the value of the evidence. Thus, he overruled the contention raised on behalf of the prosecution that the powers of the committing magistrate did not extend to weighing the evidence and that the expression “sufficient grounds” did not include the power of discrediting eye-witnesses. Though the Code of Criminal Procedure was several times substantially amended after the date of that decision, the basic words ‘sufficient grounds’ have continued throughout. That decision was approved by a Division Bench of the Bombay High Court. In re Bai Parvati ILR 35 Bom 163 and the observations aforesaid in the Allahabad decision were held to be an accurate statement of the law as contained in s. 209 of the Code, as it now stands. The High Court of Bombay held in that case that where the evidence tendered for the prosecution is totally unworthy of credit, it is the duty of the magistrate to discharge the accused. It also added that where the magistrate entertains any doubt as to the weight or quality of the evidence, he should commit the case to the Court of Session which is the proper authority to resolve that doubt and to assess the value of that evidence.”

60. xxxxxxxx

61. In these circumstances, we are of the opinion that the bringing of the fresh complaint is a gross abuse of the process of the Court and is not with the object of furthering the interests of justice.”

20. In **Poonam Chand Jain & Anr. vs. Fazru** [AIR (2010) SC 631], while discussing maintainability of the second complaint, the apex court, in paragraph no. 27, held as under:-

“27. Following the aforesaid principles which are more or less settled and are holding the field since 1962 and have been repeatedly followed by this Court, we are of the view that the second complaint in this case was on almost identical facts which was raised in the first complaint and which was dismissed on merits. So the second complaint is not maintainable. This Court finds that the core of both the complaints is the same. Nothing has been disclosed in the second complaint which is substantially new and not disclosed in first complaint. No case is made out that even after the exercise of due diligence the facts alleged in the second complaint were not within the application of the first complainant. In fact such a case could not be made out since the facts in both the complaints are almost identical. Therefore, the second complaint is not covered within exceptional circumstances explained in **Pramatha Nath** (supra). In that

view of the matter the second complaint in the facts of this case, cannot be entertained.”

21. In the instant case on hand, the first complaint was dismissed in exercise of power conferred under Section 203 of the Code after considering not only the allegations made in the complaint but also the allegations made by the complainant in her statement made on oath and the statements of the three inquiry witnesses named in the complaint petition.

22. The dismissal of the first complaint was not on an incomplete record or on a misunderstanding of nature of complaint. The order passed by the learned Magistrate under Section 203 of the Code in the first complaint cannot be held to be absurd, unjust or foolish. The complainant has also not brought any new fact which was not brought on the record in the previous proceedings. The second complaint has been filed in exactly the same words as in the first complaint.

23. Thus, I am of the view that the earlier order dated 22.01.2009 in Complaint Case No. 945(C) of 2006 by the learned Magistrate under Section 203 of the Code was given against the complainant upon a full consideration of her case and, giving another opportunity to her or any other person for having the allegations made in the complaint inquired into, cannot be in the

interest of justice. I am also of the view that the fact of dismissal of earlier Complaint Case No. 945(C) of 2006 was suppressed purposely and designedly by the complainant while filing the second complaint in order to find a favourable order from the court.

24. Keeping in view the facts of the present case and the law laid down by the Supreme Court the impugned order dated 26.4.2012 passed by the learned Magistrate cannot be sustained.

25. Accordingly, the order dated 26.04.2012 passed by the learned Judicial Magistrate, 1st Class, Khagaria and the entire proceedings of the Complaint Case No. 127(C) of 2009 are quashed.

26. The application stands allowed.

(Ashwani Kumar Singh, J.)

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