

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.6931 of 2012

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1. Damodar Yadav, S/O Late Sudin Yadav.
2. Tapeswar Yadav @ Tipu Yadav, S/O Govind Yadav,
Both resident of Village- Dayalpur, P.S.- Rajoun, District- Banka.
..... Petitioner/s

Versus

1. The State of Bihar
2. Kavita Devi, W/O Gopal Yadav, Resident of village- Dayalpur, P.S.- Rajoun,
District- Banka.
..... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Pankaj Kumar Sinha, Advocate.
Mr. Rajiv Kumar Singh, Advocate.
For the Opposite Party/s : Mr. Rajendra Prasad Nat, APP.

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR

C.A.V. JUDGMENT

Date: 07-11-2017

Heard learned counsel for the petitioners and learned
counsel for the State.

2. Petitioners have filed this application, under Section
482 of the Code of Criminal Procedure, 1973 (hereinafter referred to
as the 'Code'), seeking quashing of order dated 03.11.2011 passed by
the Judicial Magistrate, 1st Class, Banka in Complaint Case No. 1892
of 2009 thereby taking cognizance of offence against the petitioners
under Section 354 of the Indian Penal Code.

3. The fact, as stated in the complaint, is that, on
15.09.2003 at 11:00 P.M., while complainant was sleeping on a cot in
the house along with her husband and by the side her daughter and
son, both accused-petitioners, armed with pistol, intruded into the



house and put pistol on the side of the head of her husband asking him to keep quite and not to raise alarm, one of the accused Tipu Yadav tied hand and leg of her husband and another accused Damodar Yadav committed rape to her. When she protested, Tipu Yadav abused and assaulted her with *lathi* and after committing rape, they escaped away. While she was resisting, her children also woke up and saw the occurrence. She went to lodge police case in the next morning but police refused to register it, so she filed a complaint case in the court.

4. The complaint of the complainant was sent by the Chief Judicial Magistrate, Banka to the police, under Section 156(3) Code for registering a police case and to do investigation. Accordingly, Rajoun P.S. Case No. 140 of 2004 was registered against both the accused persons under Sections 323, 376, 458 and 504 of the Indian Penal Code. On completion of investigation, police, finding the case false, submitted final report. Complainant filed a protest petition and treating the same as complaint, the Magistrate proceeded for enquiry and thereafter he has taken cognizance of offence under Section 354 of the Indian Penal Code.

5. Learned counsel, appearing on behalf of the petitioners, submits that after filing of the complaint, it was sent to the police for institution of FIR, but in the meanwhile, she filed a petition in the court of Chief Judicial Magistrate, on 23.01.2004, stating that as



no FIR has been registered, so the said complaint be recalled and the court would proceed with the enquiry. Accordingly, case was transferred to Judicial Magistrate for making an enquiry and by order dated 22.02.2005, complaint was dismissed for non-prosecution, as no witness was produced by the complainant but the police has registered the police case and after completing the investigation submitted final report which was accepted by the Chief Judicial Magistrate, Banka and on protest petition, again conducted inquiry thereafter cognizance has been taken. So once the complaint was dismissed, cognizance, on the basis of second complaint, relating to the same offence, cannot be taken, as dismissal order dated 22.02.2005 passed in first Complaint No. 1177 of 2003 had already attained finality. It was also submitted that cognizance has been taken by the court under Section 354 of the Indian Penal Code for the alleged offence dated 15.09.2003 after lapse of period of limitation in view of Section 468 of the Code.

6. Contrary to that, learned counsel appearing for the State as well as O.P. No. 2 submit that second complaint is maintainable as first complaint was not dismissed on merit rather on the ground of default and the cognizance is also not barred by limitation because in the interest of justice even after expiry of the lamination period, cognizance can be taken.

7. Now, one of the questions raised by the learned



counsel for the petitioners is that once the first complaint was dismissed by the court for non-prosecution so second complaint is not maintainable and on that basis the court cannot take cognizance. However, it is evident that by order dated 22.02.2005, first complaint was dismissed on the ground of default thereafter the police submitted final report in Rajoun P.S. Case No 140 of 2004. Subsequently, a protest petition was filed by complainant and treating the same as complaint, the Magistrate conducted enquiry and finding sufficient ground, he has taken cognizance of offence under Section 354 of the Indian Penal Code.

8. The issue of maintainability on second complaint has been decided by the Apex Court in the case of ***Pramatha Nath Talukdar v. Saroj Ranjan Sarkar*** reported in ***AIR 1962 SC 876***. The Supreme Court has held in the said judgment that an order of dismissal, under Section 203 of the Code, is no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, e.g., where the previous order was passed on an incomplete record or on misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not with reasonable diligence, have been brought on the record in the previous proceeding. Moreover, in the case of ***Jatinder Singh v. Ranjit Kaur***



reported in *AIR 2001 SC 784*, it is also held by the Apex Court that dismissal of a complaint on the ground of default is no bar for a fresh complaint if filed on the same facts. In the present case, complaint was earlier dismissed due to default of the complainant and not on considering merit of the case, so there is no illegality on that very ground and on that score order of taking cognizance is not bad.

10. As far as ground of limitation is concerned, the period of limitation can be extended by the court in view of Section 473 of the Code, if the same is in the interest of justice or if the court is satisfied considering the facts and circumstances of the case that the delay is properly explained. In the present case it is also in the interest of justice to waive off the limitation considering the nature of offence. So no ground is made out for quashing the criminal proceeding against the petitioners. Accordingly, the application stands dismissed.

(Arun Kumar, J)

Sujit/-

AFR/NAFR	NAFR
CAV DATE	10.05.2017
Uploading Date	08.11.2017
Transmission Date	08.11.2017

