

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.23035 of 2016

Arising Out of PS.Case No. -20 Year- 2012 Thana -KAARAMCHAT SAHAYAK District-
BHABHUA (KAIMUR)

- =====
1. Ram Ashish Dubey S/o late Sanmukh Dubey.
 2. Rannu Dubey @ Ranu Kumar Dubey S/o Ram Ashish Dubey.
 3. Abhimanyu Dubey @ Manu Dubey @ Abhimanyu, S/o Ram Ashish Dubey.

.... Petitioner/s

Versus

The State of Bihar

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Dharmendra Kumar, Advocate

For the Opposite Party/s : Mr. Shakir Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

ORAL JUDGMENT

Date: 13-04-2017

Heard learned counsels for the petitioners and the State.

The present application has been filed for quashing of the order dated 25.02.2016, passed by the learned Sessions Judge, Kaimur at Bhabua, in Sessions Trial No. 394 of 2015, arising out of Karmachat P.S. Case No. 20 of 2012, whereby petitioners' application under Section 228(1)(a) of the Code of Criminal Procedure (hereinafter referred to as the 'Code') with a prayer for transfer of the case for trial to the court of the Magistrate has been rejected.

The prosecution case would unveil that the informant, Jawahir Sah, submitted a written report to the Officer Incharge of Karmachat Police station, alleging therein that on 26.5.2012 at about



11 A.M., the petitioners and one Arvind Dubey came to the house of the informant concerning a land dispute, but the issue could not be resolved. When the Panches left, co-accused Arvind Dubey set fire to the house of the informant and it is further alleged that Arvind Dubey dealt a garasa blow causing injury to the informant. All the accused persons also assaulted the informant and his family members and the dwelling house of the informant was burnt to ashes. Subsequently, the villagers came, upon which the accused persons escaped from the place of occurrence leaving behind one motorcycle, mobile and ATM card, whereupon the motorcycle was damaged by the villagers, leading to registration of Karamachat P.S. Case No. 20 of 2012, under Sections 341,323,324,307,504 and 436/34 of the IPC.

On conclusion of investigation, charge sheet was submitted under Sections 341,323,324,504 and 436/34 of the IPC and accordingly, the learned Chief Judicial Magistrate, Kaimur took cognizance under the aforementioned provisions.

On 21.1.2016, a petition was filed under Section 228(1)(a) of the Code on behalf of the petitioners for transferring the case to the Court of learned Chief judicial Magistrate, on the ground that only the offence under Section 436 of the IPC is triable by the Court of Sessions, which is not being made out. Subsequently, a case being Karmachat P.S. Case No. 21 of 2012 was lodged by petitioner



no. 1 against the informant's side, which suggests that in the background of land dispute between the parties, the accusation has been levelled. Moreover, the hutment, which was allegedly set on fire, was not a dwelling house and the injury which is alleged to have been caused is simple in nature. The discharge application filed before the learned trial court has not been brought on record to enable this court to appreciate the issue raised by the petitioner.

Learned Sessions Judge, Kaimur, vide order dated 25.2.2016, passed in S.T. No. 394 of 2015, has held that the burnt house was being used as a dwelling house, as has been stated by the witnesses during investigation and hence the offence under section 436 of the IPC is made out. Consequently, the learned Sessions Judge has rejected the prayer of the petitioners for transfer of the case to the Court of the learned Magistrate. The said order is impugned in the present proceeding.

Learned counsel for the petitioners submits that even after assuming the accusation, no offence under Section 436 of the IPC is made out. Moreover, the accusation has been levelled in the background of land dispute between the parties.

Learned APP appearing on behalf of the State submits that the learned Sessions Judge has referred to paragraph nos. 11,12,13,24,42,43,44 and 45 of the case diary and has come to a



conclusion that the burnt hutment was a dwelling house, hence, prima facie offence under Section 436 of the IPC is made out, which is exclusively triable by the Court of Sessions. The impugned order has been passed upon considering the materials on record, hence it requires no interference.

Chapter XVIII of the Code deals with the trial before the Court of Sessions. Section 226 stipulates the opening of the prosecution, when the accused appears or is brought before the Court in pursuance to commitment of the case and the prosecutor shall describe the charge brought against the accused by stating the evidence on which he proposes to prove the case. Sections 227 and 228 deal with the discharge and framing of charge, which read as follows:

“Section 227 - Discharge - If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

Section 228 - Framing of charge (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-



(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate [or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate] shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under Clause (b) of Sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

From perusal of the aforementioned provisions, it appears that at the stage of section 227 of the Code, the Court has to consider the records of the case, documents submitted along with the police report under section 173(2) of the Code and after hearing the submissions of the prosecution and the accused, if the court considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record the reasons for doing so. If



after such consideration, the court declines to discharge and is of the opinion that there is ground for presuming that the accused has committed an offence which is not exclusively triable by the Court of Sessions, he may frame charge against the accused and by order, transfer the case to the Court of C.J.M., for being transferred to any other Magistrate, whereupon the Magistrate shall try the offence, but under section 228(1)(b) of the Code, if the Judge comes to the opinion that the case is exclusively triable by the Court of Sessions, he shall directly frame charge in writing.

It is not necessary for the Sessions Court to try only those cases which are exclusively triable by the Court of Sessions. Section 26 of the Code stipulates that the trial of any offence under the IPC can be tried by the Court of Sessions. Hence, the discretion lies with the Sessions Judge under section 228(1)(b) of the Code either to try the case himself or under section 228(1)(a) of the Code, he may transfer it to the court of a Magistrate, as has been held by the Apex Court in the case of Sudhir and Ors. Vs. State of M.P. and analogous cases (2001) 2 Supreme Court Cases 688. Paragraph 15 reads as follows:

“15. In this context, we may point out that a Sessions Judge has the power to try any offence under the Indian Penal Code. It is not necessary for the Sessions Court that the offence should be one



exclusively triable by a Court of Sessions. This power of the Sessions Court can be discerned from a reading of Section 26 of the Code. When it is realised that the Sessions Judge has the power to try any offence under the Indian Penal code and when a case involving offence not exclusively triable by such court is committed to the Court of Sessions, the Sessions Judge has to exercise a discretion regarding the case which he has to continue for trial in his court and the case which he has to transfer to the Chief Judicial Magistrate. For this purpose we have to read and understand the scope of Section 228(1) in the light of the above legal position.”

The provision under section 228(1)(a) of the Code stipulates that if the Judge after such consideration of the records of the case and the documents submitted therewith and hearing of the prosecution and the defence, as stipulated under section 227 of the Code forms an opinion that there is ground for presuming that the case is not exclusively triable by the Court of Sessions then he may frame charge against the accused and transfer the case to the court of learned CJM or any other Magistrate, while in the present case, the learned Sessions Judge has come to a conclusion that the offence under section 436 of the IPC is made out, as the house which is alleged to have been burnt was a dwelling house. At this stage, the



learned Sessions Judge has only to form an opinion to find whether prima facie case is made out or not. Moreover, under section 26 of the Code, the Court of Sessions has the jurisdiction to try any offence under the IPC.

The word 'presumption' has not been defined in the Code, however, the word 'presume' has been elaborated by the Apex Court in the case of State of Maharashtra Vs. Som Nath Thapa (1996) 4 Supreme Court Cases 659. Paragraph 31 reads as follows:

“Let us note the meaning of the word "presume". In Black's Law Dictionary it has been defined to mean "to believe or accept upon probable evidence". (Emphasis ours). In Shorter Oxford English Dictionary it has been mentioned that in law "presume" means "to take as proved until evidence to the contrary is forthcoming", Stroud's Legal Dictionary has quoted in this context a certain judgment according to which "A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged." (Emphasis supplied). In Law Lexicon by P. Ramanath Aiyer the same quotation finds place at page 1007 of 1987 edition.”

In view of the above definition, the Apex Court held that the word 'presume' means – if on the basis of materials on record, a



court could come to a conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. Meaning thereby, in exercise of jurisdiction under section 228(1)(a) of the Code, the Court has only to see that a prima facie case exclusively triable by the Court of Sessions is made out or not, as has been held in the case of Soma Chakravarty Vs. State through CBI (2007) 5 Supreme Court Cases 403. Paragraph 10 reads as follows:

“It may be mentioned that the settled legal position, as mentioned in the above decisions, is that if on the basis of material on record the Court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true at that stage. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commitment of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial.”

At the stage of sections 227 and 228 of the Code, the



court is required to weigh the material and documents on records only for the limited purpose to see whether prima facie case is made out against the accused or not.

The Apex Court, in the case of Amit Kapoor Vs. Ramesh Chander & Anr. (2012) 9 Supreme Court Cases 460 has laid down the parameters for exercise of power under section 482 of the Code for quashing the order passed under section 227 of the Code refusing to discharge or for quashing the order passed under section 228 of the Code for framing charge. It has been held that power for quashing criminal proceeding, particularly, charge framed in terms of section 228 should be exercised very sparingly with circumspection and that too in rarest of the rare cases. Paragraph Nos. 27.1, 27.9, 27.10, 27.12, 27.13, and 27.14 read as follows:

“27.1 Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.9 Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of



which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10 It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.12 In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

27.13 Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

27.14 Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to



frame a charge.”

Now adverting to the present case, it appears that in the FIR, there is specific accusation of setting the house of the informant on fire. On conclusion of investigation, charge sheet was submitted under sections 341,323,324,504 and 436/34 of the IPC and consequently, cognizance was also taken under the aforesaid provisions of the IPC. The learned Sessions Judge, on consideration of materials on record, vide order dated 25.2.2016, has held that the offence under section 436 of the IPC is made out which is triable by the Court of Sessions.

Section 436 of the IPC deals with mischief by fire or explosive substance with intent to destroy house, which reads as follows:

“436. Mischief by fire or explosive substance with intent to destroy house, etc - Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with ¹⁵²[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”



The above provision reflects that if any destruction by fire is being made to the building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, then the offence under section 436 of the IPC is made out.

In the present case, the accusation is that the dwelling house of the informant was put on fire. The final form (charge sheet) was submitted under section 436 of the IPC and consequently, cognizance was also taken under the aforesaid provision.

At the time of exercise of jurisdiction, under section 227 or 228 (1)(a) or (1)(b) of the Code, the Court has only to see whether a prima facie case is made out for proceeding against the accused. The house has to be treated as a place of dwelling, if it is ordinarily being used as a dwelling house. Hence, the question whether the house was being used as dwelling house or not, it can be adjudicated during trial on the basis of evidence.

The power under section 228(1)(a) of the Code is only exercised, after the court, on considering the material on record and hearing the parties, decides not to discharge the accused under section 227 of the Code.

So far as the submissions of learned counsel for the petitioners, that the hutment which is alleged to have been burnt to ashes was not a dwelling house and that the accusation has been



levelled in the background of land dispute between the parties, are concerned, it is well settled view that section 227 of the Code does not permit the accused to file any material or documents at the stage of consideration of discharge or framing of charge. Though for the first time, a different view was taken in the case of Satish Mehra Vs. Delhi Administration and Anr. (1996) 9 Supreme Court Cases 766, where it was held that if the accused succeeds in producing any reliable material at that stage which might fatally affect even the very sustainability of the case, then such material can be considered.

Paragraph Nos. 13 and 14 read as follows:

“13. Similar situation arises under Section 239 of the Code (which deals with trial of warrant cases on police report). In that situation the Magistrate has to afford the prosecution and the accused an opportunity of being heard besides considering the police report and the documents sent therewith. At these two stages the code enjoins on the Court to give audience to the accused for deciding whether it is necessary to proceed to the next stage. It is a matter of exercise of judicial mind. There is nothing in the Code which shrinks the scope of such audience to oral arguments. If the accused succeeds in producing any reliable material at that stage which might fatally affect even the very sustainability of the case, it is unjust to suggest that no such material shall be looked into by the Court at that stage. Here



the "ground" may be any valid ground including insufficiency of evidence to prove charge.

14. The object of providing such an opportunity as is envisaged in Section 227 of the code is to enable the Court to decide whether it is necessary to proceed to conduct the trial. If the case ends there it gains a lot of time of the Court and saves much human efforts and cost. If the materials produced by the accused even at that early stage would clinch the issue, why should the Court shut it out saying that such documents need be produced only after wasting a lot more time in the name of trial proceedings. Hence, we are of the view that Sessions Judge would be within his powers to consider even materials which the accused may produce at the stage contemplated in Section 227 of the Code.”

The above said view was doubted and the matter was referred to a three Judge bench in the case of State of Orissa Vs. Debendra Nath Padhi (2005) 1 Supreme Court Cases 568, where the Apex Court has elaborated the meaning of expression ‘the record of the case’ and the word ‘case’ used in Section 227 of the Code. It was held that no provision of the Code gives the accused right to file any material or document at the stage of framing of charge except the document and articles produced with the police report submitted under section 173(2) of the Code. Paragraphs 18 and 23 read as



follows:

“18. We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced. The scheme of the Code and object with which Section 227 was incorporated and Sections 207 and 207 (A) omitted have already been noticed. Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the



law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the stage of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police.”

“23. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. Satish Mehra's case holding that the trial court has powers to consider even materials which accused may produce at the stage of Section 227 of the Code has not been correctly decided.”

The issue whether at the stage of exercise of jurisdiction under section 227 of the Code, the Court can look into the defence material was further examined in the case of Rukmini Narvekar Vs. Vijaya Satardekar & Ors. (2008) 14 Supreme Court Cases 1, where Justice Katju while reiterating the view laid in Debendra Nath Padhi (supra) had observed that in exceptional and rare cases the court can



look into the material produced by the defence at the time of framing of charge, provided such material convincingly demonstrates that the prosecution version is totally absurd or totally concocted. Paragraph 22 reads as follows:

“22. Thus in our opinion while it is true that ordinarily defence material cannot be looked into by the Court while framing of the charge in view of D.N. Padhi's case (supra), there may be some very rare and exceptional cases where some defence material when shown to the trial court would convincingly demonstrate that the prosecution version is totally absurd or preposterous, and in such very rare cases the defence material can be looked into by the Court at the time of framing of the charges or taking cognizance. In our opinion, therefore, it cannot be said as an absolute proposition that under no circumstances can the Court look into the material produced by the defence at the time of framing of the charges, though this should be done in very rare cases, i.e. where the defence produces some material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted.”

However, Justice Altamas Kabir, while writing concurring judgment, has held that at the stage of Section 227 of the Code, the trial court cannot consider the material produced by the defence, however, such material can be considered in exercise of power under



section 482 of the Code. Paragraph Nos. 37 and 38 read as follows:

“37. The larger Bench did not leave any scope for a different interpretation of the provisions of Section 227 as is now being made. Incidentally, the very same arguments which have been advanced by Mr. Lalit before us on behalf of the accused, were also advanced by learned Counsel before the larger Bench and the same were negated as far as Section 227 Cr.P.C. is concerned. However, in paragraphs 21 and 29 of the judgment the larger Bench did indicate that the width of the powers of the High Court under Section 482 Cr.P.C. and Article 226 of the Constitution is unlimited whereunder in the interest of justice the High Court could make such order as may be required to secure the ends of justice and to prevent abuse of the process of any court.

38. In my view, therefore, there is no scope for the accused to produce any evidence in support of the submissions made on his behalf at the stage of framing of charge and only such material as are indicated in Section 227 Cr.P.C. can be taken into consideration by the learned magistrate at that stage. However, in a proceeding taken therefrom under Section 482 Cr.P.C. the Court is free to consider material that may be produced on behalf of the accused to arrive at a decision whether the charge as framed could be maintained. This, in my view, appears to be the intention of the legislature in wording Sections 227 and 228 the way in which they have been worded and as explained in Debendra Nath Padhi's case (supra) by the larger Bench to which the very same question had



been referred.”

The impugned order is dated 25.2.2016, but there is nothing on record to suggest the present stage of trial. Thus, in view of the discussions made above, there is no infirmity in the impugned order warranting interference by this court.

In view of the discussions made above, this Court finds no merit in the application. It is accordingly dismissed. However, any observation made in this order may not prejudice the case of either party at the trial.

(Dinesh Kumar Singh, J)

Prakash/-Anil/

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