

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.46747 of 2013

Arising Out of PS.Case No. -null Year- null Thana -null District- BHAGALPUR

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1. Narayan Sharma, Son of Tiwari Sharma

2. Amrendra Sharma, Son of Narayan Sharma

3. Tuntun Sharma @ Tuntun Kumar Sharma Son of Tiwari Sharma

All resident of Village- Balua Tola, Mirzapur, P.S.- Nathnagar (Madhusudanpur).
Distt- Bhagalpur

4. Gopal Jha @ Gopal Chandra Jha, Son of Late Bhagwat Jha

5. Sushil Jha Son of Kailash Jha

Nos. 4 and 5 resident of Village-Naya Tola Karela, P.S.-Nathnagar
(Madhusudanpur), Distt.- Bhagalpur

.... Petitioners

Versus

1. The State of Bihar

2. Chandra Shekhar Mishra, Son of Late Shiv Shankar Mishra, Resident of Village
Balua Tola, Mirzapur, P.S.-Nathnagar (Madhusudanpur), Distt-Bhagalpur

.... Opposite Parties

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Appearance :

For the Petitioner/s	:	Md. Javed Jafar Khan, Advocate
For the State	:	Mr. Pradeep Narain Kunwar, APP
For the opposite party no.2	:	Mr. B.P. Pandey, Senior Advocate Mr. P.K. Sinha, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 17-08-2017

Heard Md. Javed Jafar Khan, learned counsel for the
petitioners, Mr. Pradeep Narain Kunwar, learned Additional Public
Prosecutor for the State and Mr. Bibhuti Prasad Pandey, learned
Senior Counsel for the opposite party no.2.

2. This application under Section 482 of the Code of
Criminal Procedure (for short 'Cr.P.C.') has been filed by the
petitioners for setting aside the order dated 28.05.2012 passed by the



learned Ad hoc Additional Sessions Judge-3rd, Bhagalpur, in Criminal Revision No.220 of 2011 corresponding to T.R. No.50 of 2011, whereby and whereunder the revision application filed by the opposite party no.2 was allowed and the order of dismissal of Complaint Case No.2588 of 2010 passed by the court of learned Sub-divisional Judicial Magistrate, Bhagalpur, in Complaint Case No.2588 of 2010, was set aside and the court below was directed to pass a fresh order and further for quashing the consequential order dated 24.08.2012 passed by the learned Sub-divisional Judicial Magistrate, Bhagalpur, in Complaint Case No. 2588 of 2010, whereby and whereunder the petitioners were summoned to face trial for the offences punishable under Sections 302 and 120B of the Indian Penal Court.

3. The short facts of the case is that on 16.12.2003, a complaint, vide Complaint Case No.729 of 2003, was filed before the court of Chief Judicial Magistrate by the opposite party no.2 for the offences under Sections 302 read with 34 and 120 B of the Indian Penal Code against the petitioners alleging therein that in the morning, on 01.09.2003, a telephonic call was received by the neighbor of the opposite party no.2 namely, Anil Mandal and said Anil Mandal was asked to call the wife of opposite party no.2. Upon such information, the opposite party no.2 went to the house of said



Anil Mandal where she talked to petitioner no.2 Amrendra Sharma, who told her to send her son Ashutosh Mishra to Jamalpur immediately for some urgent work. Thereafter, Ashutosh Mishra went to meet with the petitioner no.2 at Jamalpur and when he did not return home, the opposite party no.2 enquired about his son from the petitioner no.2, who told him that his son had gone to Delhi for job. The opposite party no.2, thereafter, submitted an application before the Officer-in-Charge of Madhusudanpur police station and the Superintendent of Police, Bhagalpur, but, in the meantime, on 13.01.2013, petitioner no.3 Tuntun Sharma came to the house of the opposite party no.2 and demanded a photograph of his son, which was denied by the opposite party no.2 upon which petitioner no.3 told the opposite party no.2 that his son is no more. He also told him to go Jamalpur Rail police station where he would receive all the necessary information. The opposite party no.2 started crying and went to Jamalpur Rail police station where the Officer-in-charge of the police station handed over the inquest report and photograph of the dead body of his son. Then the opposite party no.2 raised a suspicion that all the petitioners, under a planned conspiracy, kidnapped his son and then killed him.

4. The complaint filed by the opposite party no.2 was referred to the police for investigation, in exercise of powers



conferred under Section 156(3) of the Cr. P.C. by the learned Chief Judicial Magistrate, Bhagalpur pursuant to which Nathnagar (Madhusudanpur) P.S. Case No. 39 of 2004 was registered under Sections 304/34 and 120B of the Indian Penal Code and investigation was taken up.

5. After completing the investigation, the police submitted final form on 11.12.2004 in favour of the petitioners, as mistake of fact, because during investigation, it transpired that the deceased Ashutosh Mishra was going to his sister's house at Dasrathpur by 837 UP Sahibganj-Keul Passenger Train. Due to magistrate checking, the deceased got down from the train at Kalyanpur Railway Station for taking ticket and, in the meantime, the train started to leave the station and the deceased tried to catch the train in running position, but his legs slipped and he came under the wheels of the train and died. The investigation report also disclosed that an U.D. Case was instituted in this regard on 1st September, 2003, vide U.D. Case No.25 of 2003.

6. It would be pertinent to note here that prior to the filing of the final form, the opposite party no.2 had filed a protest petition. The learned Chief Judicial Magistrate, while accepting the police report submitted under Section 173(2) Cr.P.C., directed for institution of a separate complaint on the basis of the protest petition



pursuant to which, Complaint Case No. 2588 of 2010, was registered and the complaint was made over to the court of Sub-divisional Judicial Magistrate, Bhagalpur for inquiry and trial under Section 192 of the Cr.P.C.

7. The complainant-opposite party no.2 was, thereafter, examined on oath. In course of inquiry under Section 202 of the Cr.P.C., statements of the four inquiry witnesses namely, Manorma Devi, Asha Devi, Nagendra Jha and Ratnakar Jha were recorded. After considering the statements made in the complaint, the statements of the complainant made on oath and the statements of the witnesses recorded under Section 202 of the Cr. P.C., the learned Sub-divisional Judicial Magistrate, vide order dated 14.07.2011, dismissed the complaint holding that there was lack of evidence to summon the petitioners to face trial.

8. Being aggrieved and dissatisfied with the order of dismissal of complaint dated 14.07.2011, the opposite party no.2 preferred revision application before the Court of Session vide Criminal Revision No.220 of 2011 with impleading the petitioners, as opposite party. The learned Session Judge transferred the revision petition to the court of the learned Ad hoc Additional District and Sessions Judge-3rd, Bhagalpur, who heard the matter and set aside the order dated 14.07.2011, vide order dated 28.05.2012 and directed



Sub-divisional Judicial Magistrate to pass a fresh order in Complaint Case No.2588 of 2010.

9. Thereafter, the learned Sub-divisional Judicial Magistrate, Bhagalpur passed the impugned order dated 24.08.2012 whereby the petitioners were summoned to face trial for the offences punishable under Sections 302 and 120B of the Indian Penal Code.

10. While assailing the order dated 28.05.2012, passed by the learned Ad hoc Additional District and Sessions Judge-3rd, Bhagalpur, in Criminal Revision No.220 of 2011 and the order dated 24.08.2012 passed by the learned Sub-divisional Judicial Magistrate, Bhagalpur, in Complaint Case No.2588 of 2010, learned counsel for the petitioners has submitted that the aforesaid orders are bad in law in view of the fact that the petitioners were not made party in the revision application preferred by the complainant-opposite party no.2 and the revisional court had passed the order without affording any opportunity and without hearing the petitioners and only after hearing the counsel appearing on behalf of the opposite party no.2 and the counsel for the State of Bihar. He has submitted that the order is bad in view of the law laid down by the Supreme Court in **Manharibhai Muljibhai Kakadia & Anr. Vs. Shaileshbhai Mohanbhai Patel & Ors. [(2012) 10 SCC 517]**, **P. Sundarrajan and Ors. V. R. Vidhya Sekar [2004 (13) SCC 472]**, **Raghu Raj**



Singh Rousha v. Shivam Sundaram Promoters Private Limited and another [2009 (2) SCC 363] and A. N. Santhanam v. K. Elangovan [2011 (2) JCC 720 (SC)].

11. Having been confronted with the argument advanced by the learned counsel for the petitioners, Mr. Bibhuti Prasad Pandey, learned Senior Advocate appearing for the complainant-opposite party no.2 fairly conceded that the order passed by the learned Session Judge and the consequential order passed by the learned Sub-divisional Judicial Magistrate cannot be sustained in view of the law laid down by the Supreme court in the decisions on which reliance has been placed by the petitioners. He has submitted that the accused may not have any right prior to taking of cognizance of the offence in a complaint case before the court of Magistrate, but once the Magistrate has exercised his power and dismissed the complaint under Section 203 of the Cr. P.C., if a revision application is filed either before the Court of Session or before this Court, a right is vested in the accused to be heard, in case of an order, which may adversely affect the accused is passed.

12. Mr. Pradeep Narain Kunwar, learned Additional Public Prosecutor for the State also conceded that in view of the ratio laid down by the Supreme Court in the aforesaid decisions, the



impugned order cannot be sustained.

13. I have heard learned counsel for the parties and perused the record.

14. The facts of the case in **Manharibhai Muljibhai Kakadia & Anr.** (supra), in short, was that one Shaileshbhai Mohanbhai Patel had filed a criminal complaint in the court of Chief Judicial Magistrate, Surat against one Manharibhai Muljibhai Kakadia and Paresh Lavjibhai Patel alleging that they had pre-planned a conspiracy, created forged documents bearing signatures of the complainant, his father and uncle, two sons of his uncle and his elder brother and have used the said documents as true and genuine by producing the same before the District Registrar, Cooperative Society, Nanpura and, by making false representation, obtained registration of Indorgency Cooperative Housing Society Limited and, by doing so, the accused have caused financial loss and physical and mental agony to the complainant and his family members and have deceived the complainant by obtaining huge financial advantage by taking possessions of the complainant's property. The learned Chief Judicial Magistrate, in exercise of power under Section 202 of the Cr.P.C., directed the enquiry to be made by the Police Inspector, Umra Police Station, into the allegations made in the complaint and submit his report. The Police Inspector



investigated into the matter and submitted his report holding that the dispute between the parties was of civil nature and no offence was made out. Thereafter, the learned Chief Judicial Magistrate accepted the report submitted by the Investigating Officer and dismissed the complaint. Being aggrieved by the dismissal of the complaint, the complainant challenged the order before the revisional Court under Section 397 read with Section 401 of the Code in the Gujarat High Court. The accused persons, having come to know of the criminal revision application, made an application for joining them as party respondents so that they can be heard in the matter. However, the application of the accused persons was dismissed by the High Court, which order was challenged before the Supreme Court. The Supreme Court, after hearing the parties, set aside the order passed by the High Court whereby the application for impleadment in the criminal revision petition was dismissed. While deciding the issue as to whether the accused or a person, who is suspected to have committed crime is entitled to hearing by the revisional court, the Supreme Court placing reliance on the earlier decisions in **P. Sundarrajan** (supra), **Raghu Raj Singh Rousha** (supra) and **A.N. Santhanam** (supra) observed as under:-

“We are in complete agreement with the view expressed by this Court P. Sundarrajan, Raghu Raj Singh Rousha and A.N. Santhanam. We hold, as it must be, that in a revision petition



preferred by complainant before the High Court or the Sessions Judge challenging an order of the Magistrate dismissing the complaint under Section 203 of the Code at the stage under Section 200 or after following the process contemplated under Section 202 of the Code, the accused or a person who is suspected to have committed crime is entitled to hearing by the revisional court. In other words, where complaint has been dismissed by the Magistrate under Section 203 of the Code, upon challenge to the legality of the said order being laid by the complainant in a revision petition before the High Court or the Sessions Judge, the persons who are arraigned as accused in the complaint have a right to be heard in such revision petition. This is a plain requirement of Section 401(2) of the Code. If the revisional court overturns the order of the Magistrate dismissing the complaint and the complaint is restored to the file of the Magistrate and it is sent back for fresh consideration, the persons who are alleged in the complaint to have committed crime have, however, no right to participate in the proceedings nor they are entitled to any hearing of any sort whatsoever by the Magistrate until the consideration of the matter by the Magistrate for issuance of process. We answer the question accordingly. The judgments of the High Courts to the contrary are overruled”.

15. Coming back to the facts of the present, there is no dispute to the fact that after the complaint was dismissed by the learned Sub-divisional Judicial Magistrate, the petitioners were not made party in the revision petition before the Court of Session and the revision application was decided against the petitioners without affording any opportunity and without hearing them and only after



hearing the counsel on behalf of the complainant-opposite party no.2 and the counsel for the State of Bihar.

16. In view of the ratio laid down by the Supreme Court in **Manharibhai Muljibhai Kakadia & Anr.** (supra), the impugned order dated 28.05.2012 passed by the learned Ad hoc Additional Sessions Judge-3rd, Bhagalpur, in Criminal Revision No.220 of 2011 corresponding to T.R. No.50 of 2011 and the consequential order dated 24.08.2012, passed by the learned Sub-divisional Judicial Magistrate, Bhagalpur, in Complaint Case No. 2588 of 2010 cannot be sustained. They are, accordingly, set aside.

17. The application stands allowed.

(Ashwani Kumar Singh, J.)

Sanjeet/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	24.08.2017
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