

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.46040 of 2016

Arising Out of PS. Case No.-955 Year-2012 Thana- BHABHU(KAIMUR) COMPLAIN C
District- Kaimur (Bhabua)

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Laxmi Kant Tiwari, son of Late Ramji Tiwari, Resident of Village -
Atarwalia, P.O. Kathej, P.S. Mohania, District - Kaimur at Bhabua. Presently
residing at Village - Paspipara, Police Station - Mohania, District - Kaimur
Bhabua.

... .. Petitioner/s

Versus

1. The State of Bihar
2. Markandey Tiwari, son of Late Sudarshan Tiwari
3. Ram Eqbal Tiwari, son of Late Baliram Tiwari, Both resident of Village -
Atarwalia, P.O. - Kathej, P.S. Mohania, District - Kaimur at Bhabua
4. Kamla Kant Chaturvedi, son of Late Dev Sharan Chaubey
5. Devendra Nath Pandey, son of Late Lalita Pandey
6. Harendra Kumar Pandey, son of Late Lalita Pandey. Opposite Party No. 4 to
6 all resident of Village - Gheghian, P.O. Kauriram, P.S. Mohania, District -
Kaimur.

... .. Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Ashok Kumar Garg, Advocate
For the Opposite Party/s : Mr. Shyam Kumar Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT

Date : 07-08-2019

Heard learned counsel for the parties.

2. The petitioner had brought Complaint Case No. 955
of 2012 against opposite party no. 2 to 6 wherein cognizance was
taken for offences under Sections 423, 468 and 120B of the Indian
Penal Code on 18.06.2013. Thereafter, appearance of the accused
persons completed on 01.05.2015 and then the case was running
for evidence before charge. The complainant did not bring any
evidence before charge on 18.05.2015, 14.07.2015, 01.10.2015,



22.12.2015, 22.01.2016, 02.03.2016 and 12.04.2016. On 07.05.2016 also no witness was in attendance and on the prayer of the accused, they were discharged. The petitioner challenged the aforesaid order of discharge before the learned Sessions Judge, Bhabua in Cr. Revision No. 87 of 2016. The revision application was dismissed on 02.08.2016 considering the provisions of Section 245 Cr.P.C.

3. Both the orders i.e. of the Revisional Court as well as the Trial Court aforesaid are under challenge in this application under Section 482 Cr.P.C.

4. The challenge is on the ground that application for discharge was filed without service of a copy of the same to the learned counsel for the complainant or without affixing a proper court-fee stamp on that. As such, the petition was in the nature of collusive petition and the impugned order was passed on the date of filing of the petition itself.

5. Contention is that as per the mandate of Section 245 Cr.P.C., the learned Magistrate was bound to take prosecution evidence before hearing on charge. If the witnesses were not appearing, coercive step should have been taken for procuring their attendance, however, the discharge could not have been allowed.



6. Submission is that the consideration of prosecution case at the stage of cognizance and at the stage of charge, is almost the same. Only difference is that the cognizance orders are passed in absence of the accused and order of charge/discharge is passed, considering the material, in presence of the accused.

7. Learned counsel for the accused-opposite party submits that the learned Magistrate has recorded that since last seven dates, no prosecution evidence was coming before charge. Hence, the Court was bound to pass proper order and the only possible order would have been of discharge of the accused. He further submits that the Revisional Court has carefully applied its mind on the requirement of Section 245 Cr.P.C. Hence, this Court need not interfere in exercise of this extra ordinary jurisdiction.

8. The relevant provisions of the Code of Criminal Procedure governing procedure for trial of complaint cases are being reproduced below:-

“Section 244 Cr.P.C. Evidence for prosecution. -- (1) When, in any warrant-case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.



(2) The Magistrate may, on the application of the prosecution, issue a summon to any of its witnesses directing him to attend or to produce any document or other thing.

Section 245(1) Cr.P.C. When accused shall be discharged. --- (1) If, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.”

9. A bare perusal of the aforesaid provisions of the Code of Criminal Procedure makes it clear that the learned Magistrate can exercise power under sub-section (2) of Section 245 Cr.P.C. at any previous stage of the case i.e. before stage of Sections 244 and 245(1) Cr.P.C., if the Magistrate considers the charge to be groundless. The learned Magistrate has not passed order under these sections nor could have passed any such order



under these sections because cognizance was already taken in the matter and the cognizance order attend its finality. Hence, without otherwise material coming on the record, the Court cannot assume that the charge is groundless.

10. Under sub-section (1) of Section 245 Cr.P.C., the learned Magistrate is required to take evidences referred to in sub-section 244 Cr.P.C. i.e. to say the evidences which was/were produced in support of the prosecution case. Under Section 246 Cr.P.C., the learned Magistrate is competent to frame charge when evidence under Section 245 Cr.P.C. has been recorded or at any previous stage of the case when he is of the opinion that there is ground for presuming that the accused has committed an offence triable by this Chapter.

11. Thus, the conjoint reading of all the aforesaid provisions makes it clear that the learned Magistrate may frame charges even without the prosecution producing any evidence before charge provided that the learned Magistrate must have ground to presume that the accused has committed an offence. The impugned order passed by the learned Magistrate does not show that the learned court below has applied its mind on the provisions of law above.



12. The accused can be discharged under Section 249 Cr.P.C. also in absence of the complainant which reads as follows:-

Section 249. Absence of complainant -
When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

13. The aforesaid provision is not applicable as offence under Section 468 of the Indian Penal Code is not lawfully compoundable and is cognizable as well. Therefore, under Section 249 Cr.P.C. accused could not have been discharged. Moreover, so far undisputed factual position of this case is that the impugned order was passed on the written prayer of the accused without service of a copy of the same to the complainant and without giving an opportunity of hearing to the complainant, as such, flagrant violation of principle of nature justice is there. Therefore, the order of the learned Magistrate has apparently caused miscarriage of justice, hence, is not sustainable in law. The



Revisional Court has affirmed the aforesaid order which was itself bad in law. Therefore, order of the Revisional Court is also not sustainable.

14. Accordingly, both the impugned orders stand hereby quashed and this application is allowed. However, subject to payment of cost of rupees three thousand by the petitioner to the accused persons for non-production of witnesses on seven consecutive dates causing unnecessary harassment to the accused.

(Birendra Kumar, J)

Kundan/-

AFR/NAFR	N.A.
CAV DATE	N.A.
Uploading Date	13.08.2019
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