

**Sharda Devi Vs. State of Bihar and ors.**

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**Court :** Patna

**Decided On :** Aug-24-2001

**Judge :** Indu Prabha Singh, J.

**Acts :** [Constitution of India](#) - Article 227; Code of Criminal Procedure (CrPC) , 1974 - Sections 197, 202, 203, 208, 249, 256, 341, 384, 397, 397(1), 397(2), 398, 417(1), 401, 419, 482 and 483

**Appeal No. :** Crl. Revision No. 409 of 1998

**Appellant :** Sharda Devi

**Respondent :** State of Bihar and ors.

**Advocate for Def. :** Y.V. Giri and Sanjay Kumar Giri, Advs.

**Advocate for Pet/Ap. :** Vyas Muni Singh and Sanjay Kumar Singh, Advs.

**Disposition :** Application allowed

**Prior history :** Indu Prabha Singh, J. 1. This application filed under Sections 397 and 398 of the Code of Criminal Procedure, 1973 (in short 'the Code') is directed against the order dated 4-5-1998 passed by Shri A.K. Srivastava, Judicial Magistrate, 1st Class, Raxaul at Motihari (East Champaran) in Case No. C-63/98 by which the learned Court below was pleased to dismiss the complaint petition filed by the petitioner Sharda Devi (since deceased). 2. From the record it appears that Sharda , Devi had institut

## **Judgement :**

### **Indu Prabha Singh, J.**

1. This application filed under Sections 397 and 398 of the Code of Criminal Procedure, 1973 (in short 'the Code') is directed against the order dated 4-5-1998 passed by Shri A.K. Srivastava, Judicial Magistrate, 1st Class, Raxaul at Motihari (East Champaran) in Case No. C-63/98 by which the learned Court below was pleased to dismiss the complaint petition filed by the petitioner Sharda Devi (since deceased).

2. From the record it appears that Sharda , Devi had instituted Raxual P.S. Case No. 4/97 against opposite party Nos. 3 to 6 which was registered under Sections 384, 341 and 419 of the Indian Penal Code. The police after completing the investigations submitted final form finding the case to be false. Sharda Devi filed a protest petition before the learned Chief Judicial Magistrate. The matter went up to the Hon'ble High Court in Cr. Misc. No. 18025 of 1997 which was disposed of by an order dated 25-9-1997 (vide Annexure-15). In it Sharda Devi had prayed for quashing the final form (annexure-10) submitted by the police and for the releasing the seized articles. This Court by the aforesaid order directed the S.D.J.M. to dispose of the protest petition filed before him in accordance with law within a period of one month from the date of production of a copy of this order. After this order an enquiry under Section 202 of the Code was started after the examination of Sharda Devi on solemn affirmation. In course of this enquiry five P.Ws. were examined before the learned Magistrate Shri Srivastava to whom the case was transferred. However, on the conclusion of the enquiry by the impugned order the learned Magistrate had dismissed it under the provisions of Section 203 of the Code though this section was not mentioned in the order.

3. In this petition the main grievance of the petitioner is that' the learned Magistrate in the impugned order has transgressed the limits of holding an enquiry under Section 202 of the Code and has held a full-dress trial before dismissing the complaint petition under Section 208 of the Code.

4-5. A counter affidavit has been filed on behalf of the opposite party No. 3 in which it has been contended that the learned Magistrate has not committed any illegality in passing the impugned order. He dismissed the complaint petition/protest petition after due examination of the witnesses under Section 202 of the Code since he did not find any prima facie case made out against the opposite party Nos. 3 to 6. This Court in exercise of its revisional powers is not expected to set aside the order of dismissal passed by the learned Court below under Section 203 of the Code since the scope of this revision petition is extremely limited. On these grounds amongst others it has been contended that this revision application be dismissed. A similar counter affidavit has been filed on behalf of the opposite party No. 2.

6. It may be stated here that during the pendency of this revision application Sharda Devi, the original petitioner died and her husband Shri Yogendra Prasad has filed a petition for his substitution in her place and for permission to conduct the case on her behalf before this Court. So far as this prayer is concerned I will deal with it at a later stage of this judgment.

7. The parties have been heard at length with respect to the scope of enquiry under Section 202 of the Code and also whether the learned Magistrate was justified in dismissing the complaint petition on the basis of the impugned order passed by him. In this connection I will firstly refer to the impugned order which is dated 4-5-1998. From the impugned order it appears that the learned Magistrate had taken into consideration the statement on solemn affirmation of Sharda Devi whose protest petition was treated to be a complaint petition. He has also referred to the evidence of five witnesses who were examined in support of the complaint petition. Though, according to law, at this stage he had simply to find out whether a prima facie case has been made out against the accused or not for the purpose of proceeding against them under law, the learned Magistrate appears to have critically examined the evidence on record and has tried to find out whether a case fit for conviction has been made out against the accused or not. It is well-settled that at this stage all that the Magistrate is required to find out is as to whether a prima facie case against the accused has been made out or not in the course of enquiry under Section 202 of the Code. Whether the case will end in conviction or

acquittal is completely out side the preview of his examination of the evidence on record in course of the enquiry under Section 202 of the Code. This has been repeatedly held by the Hon'ble Supreme Court and different High Courts of India with respect to true scope of an enquiry under Section 202 of the Code. In this connection I will firstly refer to the case of Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi, AIR 1976 SC 1947 : (1976 Cri LJ 1533). In this case the Hon'ble Supreme Court has held that the scope of the enquiry under Section 202 of the Code is extremely limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint petition (i) on the materials placed by the complainant before the Court (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complaint without at all adverting to any defence that the accused may have. It was also held in this case that in the proceeding under Section 202 of the Code the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not. It was further held that it is not in the province of the Magistrate at this stage to enter into a detailed discussion of the merits or de-merits of the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one. Further the Hon'ble Supreme Court has held that it is only in the four type of cases mentioned in the judgment that the order of the Magistrate issuing process against the accused can be quashed or set aside. They are (i) where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused; (ii) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can overreach a conclusion that there is sufficient ground for proceeding against the accused. (iii) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and (iv) where the complaint suffers from fundamental legal defects, such as, went of sanction etc. The Hon'ble Supreme Court in this case has clearly held that at this stage the complaint petition can be dismissed on one of these

grounds mentioned above. The said case was against taking cognizance and the Court had held that the cognizance could be quashed on one of these grounds as noted above.

8. From this decision as also from the settled law on the subject it will appear that the object of an enquiry under Section 202 is only to see whether there is a prima facie case for issuing the process against the accused or not. The enquiry under Section 202 of the Code, therefore, cannot be converted into a trial to see whether the accused is guilty or not. In this connection a reference may also be made to the case of *Balraj Khanna v. Moti Ram*, AIR 1971 SC 1389 : (1971 Cri LJ 1110). In view of what has been stated above the law on this point appears to be well settled. In this connection a reference can also be made to the case of *Ram Prasad Singh v. Shri Uday Shankar Prasad* (2000 (3) PLJR 300 : (2001 Cri LJ 3033). This is a judgment by me in which I have taken into consideration the various decisions of the Hon'ble Supreme Court on this point and had held that the scope of enquiry under Section 203 of the Code is very limited only to the ascertainment of truth or falsehood of the allegation made in the complaint petition on the basis of the materials placed by the complainant without at all advertent to any defence from the accused. Thus the law on this point appears to be well settled and the parameters of the power to be exercised under the provision of Sections 202 and 203 of the Code have been clearly laid down.

9. Coming to the present case, from the counter affidavit it appears that the learned Magistrate has entered into a detailed discussion of the evidence on record, instead of finding out whether a prima facie case has been made out or not. He has proceeded to draw his own conclusions and to discredit the evidence of P.Ws. examined before him without any ostensible reason. Probably he was under the mistaken notion that at this stage he was required to find out whether the case will end in conviction or not. It appears that probably the learned Magistrate forgot that at this stage he has to simply find out whether a prima facie case has been made out or not against the accused. This is how in spite of the examination of five witnesses before him he thought it proper to dismiss the complaint petition under Section 203 of the Code. In the impugned order he has also made a reference to Section 197 of the Code. The scope of Section 197 of

the Code is, however, extremely limited and its provisions will not be attracted simply because the person to be prosecuted happens to be a public servant. If act complained of is entirely unconnected with the official duty no sanction is necessary. In order to attract the provision of Section 197 the Code complaint must bear such relationship to duty that the public servant could lay a reasonable; but not a pretended or fanciful claim; that he did not it in course of performance of his duty. However, if the act complained of can be no part of the performance of duty by public servant the protection under Section 197 of the Code will not be available to him. In the present case the allegation against the accused person is that they forcibly removed the bags from the possession of the complainant without any ostensible reason. This act on their part cannot be said to have been done in discharge of their official duty. Under this circumstance at this stage, prima facie, I do find that the complaint petition could have been dismissed for non-compliance of the provisions of Section 197 of the Code.

10. It appears that during pendency of this revision application Sharda Devi the original petitioner had died on 23-5-2000. A petition has been filed on behalf of her husband, Yogendra Prasad for the substitution of his name in place of Sharda Devi and also for permission to prosecute this revision application. The opposite party have objected to this prayer of Yogendra Prasad and have also submitted a written note of argument against the same. Their main contention is that there is no provision in the Code according to which the substitution of any person in place of the complainant can be allowed by the Court; since the Magistrate has no such power.

11. In support of this contention they have place reliance on Sections 249 and 256 of the Code. They have also relied upon some case law on this point. So far Section 249 is concerned, it relates to the trial of a warrant case and deals with the absence of the complainant. It provides that in a complaint case, if the complainant is absent on a date when the case is fixed for hearing, the Magistrate can proceed to discharge the accused (if no charge has been framed as yet) if the offence may be lawfully compounded or is not a cognizable offence. Section 256 of the Code deals with the trial of a summons case before a Magistrate and provides that in case of the absence of the complainant or his death, on the day appointed for the

appearance of the accused or on any subsequent date, the Magistrate shall acquit the accused unless he adjourns the case on some ground. The first thing to be noted in this connection is that here this is not the stage of the trial of the case. Hence the provisions of these sections are not attracted. Even otherwise I do not find any force in this contention of the opposite parties for the reasons noted below.

12. However, I will firstly refer to the case law relied upon by the opposite parties. The first case relied upon by them is the case of Nanilal Samanta v. Rabin Ghosh (1964 (1) CrL. LJ 186). This is a single Bench decision of Calcutta High Court. In this case it has been held that in case of death of the complainant before the presentation of the appeal against acquittal it is only the State Government under the provisions of Section 417(1) of the Old Code which can present the appeal. However, in the same decision it has been held that where the appeal against the judgment of acquittal has been preferred by the complainant and has been admitted his subsequent death will not result in the abatement of the appeal though substitution of any person in his place is not necessary.

13. Opposite parties have also placed reliance on the case of Subbanna v. Dyarappa (1980 Cri LJ 1405). In this case on the date of the appearance of the accused the complainant remained absent because of his death. It was held by a learned single Judge of Karnataka High Court that in such a situation the Magistrate must acquit the accused. As has been noticed above, the facts of the present case are entirely different since here at the stage of the hearing the revision petition the petitioner (complainant) died. Hence the ratio of this decision will not apply to the present case.

14. I have heard the parties on this point. So far as these decisions are concerned they do not apply to the present case. Also Sections 249 and 256 of the present Code do not apply. In the present case the complaint petition was dismissed by the Magistrate against which a criminal revision was filed before this Court. During the pendency of the criminal revision the complainant died and a petition has been filed for the substitution of the name of her husband in her place. Hence at this stage it is not the question of the substitution of the name of the complainant any

more. Moreover the present revision application has been filed under Sections 397 and 398 of the Code. Section 397 gives power to the High Court to call for and examine the record of any proceeding before any inferior Court situated within its jurisdiction for satisfying itself as to the correctness, legality or propriety of any finding or order. In this section there is no mention of the fact that it is only when a person files a petition before the Court that the powers under Section 397 can be exercised by this Court which can be done even suo motu and the High Court has got inherent power and it would be justified under such circumstances to exercise the inherent power and in appropriate case even revisional power under Section 397(1) read with Section 401 of the Code as has been held in the case of Krishnan v. Krishnavani, AIR 1997 SC 987 : (1997 Cri LJ 1519). In this connection reference may be made to the case of K. Chinnaswamy Reddy v. State of Andhra Pradesh, AIR 1962 SC 1788 : (1963 (1) Cri LJ 8). In this decision also it has been held that the High Court has got inherent power to correct the illegality committed by any subordinate Court. Similarly in the case of Waryam Singh v. Amarnath, AIR 1954 SC 215 also the same view has been taken. The principle of law appears to be that any illegality committed by an inferior Court cannot be allowed to continue if it comes to the notice of this Court which can act even suo motu. In this connection a reference may also be made to another case namely Municipal Corporation of Delhi v. Girdharilal, AIR 1981 SC 1169: (1981 Cri LJ 632). In this case the High Court had dismissed a revision application on the technical ground of limitation. The Hon'ble Supreme Court has held that where there is glaring illegality in the order of discharge the revision application should not be dismissed on mere technical ground of limitation. If this be so, can the present revision application be dismissed on account of the death of the petitioner? It is obvious that the moment the illegality of the impugned order has been brought to the notice of this Court by filing of this revision application the same cannot be dismissed only on the ground of the death of the petitioner. If this is done it will mean that the illegality committed by the learned Court below will be allowed to be perpetuated and the miscarriage of justice will be allowed to continue, Under the aforesaid circumstances it is well settled that this Court in exercise of its revisional jurisdiction can act suo motu. If this be so, can this Court not act suo motu in the present case on the death of the petitioner even if there is no provision in the Code for the substitution of the name

of any person in her place?

15. On this connection the matter has to be considered from another point of view. The powers vested in this Court under Section 482 of the Code and Article 227 of the [Constitution of India](#) are also very important which give this Court the power of superintendence on inferior Courts. In the case of *Madhu Limaye v. State of Maharashtra*, AIR 1978 SC 47 : (1978 Cri LJ 165) it has been held that this Court is vested with inherent powers even when there is bar in exercise of revisional powers under Section 397(2) of the Code. Similarly in the case of *Raj Kapoor v. State*, AIR 1980 SC 258 : (1980 Cri LJ 202) also it has been held that while Section 397(2) of the Code applies to revisional powers to the High Court Section 482 regulates the inherent power of the Court to prevent the abuse of the process of the Court. According to this decision Section 482 of the Code can be applied by this Court in suitable circumstances in the interest of justice. In the case of *Jagir Singh v. Ranbir Singh*, AIR 1979 SC 381: (1979 Cri LJ 318) it has been held that the power of judicial superintendence vested in this Court under Article 227 of the Constitution may be exercised by this Court sparingly to keep the subordinate Courts within the bounds of their authority. In the case of *Krishnan* (supra) also the same view has been taken and it has been held that the power of continuous superintendence under Section 483 of the Code has been preserved even in cases in which the revision application is not maintainable.

16. In the present case, however, the question whether the revision application is maintainable or not is not directly involved. Here the sole petitioner is said to have died on 23-5-2000 and a petition was filed by her husband Yogendra Prasad for substitution of his name in her place. The question whether any such a substitution can be allowed or not debatable and at this stage it is not necessary for me to settle the same. The fact, however, remains that certain illegality committed by the learned Court below has been brought to the notice of this Court and in exercise of its revisional jurisdiction as well as the power of superintendence this Court cannot allow the same to continue. In this background the question whether the sole petitioner is still persuing the case or not is not of much importance since in exercise of its inherent powers this Court is always free to remedy any illegality committed by any inferior Court. For the reasons stated above, Shri Yogendra

Prasad the husband of the original petitioner is permitted to prosecute this revision application on her behalf though his name cannot be substituted in her place and his petition is disposed of accordingly.

17. In view of what has been stated above it is clear that the impugned order cannot be allowed to stand. This application is, therefore, allowed and the impugned order including the order of dismissal of the complaint petition is quashed. The case is remanded back to the learned Court below for holding further enquiry under Section 398 of the Code in the matter. Under the circumstances of the case, however, there will be no order as to cost.

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